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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 462

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. .....

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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(See names of counsel at end of Petition.)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioners ("companies") in the above cases are 37 electric utilities doing business in a large part of the country. They pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 12, 1962. That judgment affirmed orders of the Federal Power Commission ("Commission").

Opinions Below.

The opinion of the Court of Appeals (App., pp. 6a-35a), rendered on May 16, 1962, is reported at 304 F. 2d 29. The opinions of the Federal Power Commission rendered on August 17, 1960, and (denying rehearing) on October 11, 1960, are reported at 24 F. P. C. 278 and 24 F. P. C. 860 (App., pp. 52a-90a).

Jurisdiction.

The judgment of the Court of Appeals was entered on July 12, 1962 (App., pp. 37a-38a). A petition for rehearing, timely filed, was denied on June 29, 1962 (App., p. 36a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1), Section 313(b) of the Federal Power Act (16 U. S. C. §825*l*), and Section 10 of the Administrative Procedure Act (5 U. S. C. §1009).

Questions Presented.

1. In a proceeding brought by the Commission under Section 301(a) of the Federal Power Act to determine the proper accounts in which certain advertising expenditures of the companies should be entered under the System of Accounts prescribed by the Commission pursuant to that Section, have the companies been denied their constitutional and statutory rights to a fair hearing by the Commission's ruling excluding all evidence proffered by the companies to show the propriety of their accounting entries under that System of Accounts? (See Point I, *infra*.)

2. May the Court of Appeals permit the Commission, under the decisions of this Court in *Service* v. *Dulles*, 354

U. S. 363 (1957) and *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959), to order the companies in such a proceeding to remove certain advertising expenditures from an operating expense account and charge them to an income deduction account without considering and deciding the applicability of controlling provisions of the System of Accounts prescribed by the Commission? (See Point II, *infra*.)

3. May the Court of Appeals permit the Commission in such a proceeding to disregard the applicability of controlling provisions of its System of Accounts and to require the companies to account for certain of their advertising expenditures in a manner not provided for by such System of Accounts solely because the advertisements relate to competition between the companies and governmental agencies acting in a proprietary capacity? (See Point II, *infra*.)

4. May the Court of Appeals, consistently with this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), affirm the Commission's findings without reviewing the record examined by the Commission to determine whether the Commission's findings are based on substantial evidence? (See Point III, *infra*.)

5. May the Court of Appeals affirm Commission findings which are wholly unsupported and flatly contradicted by the record examined by the Commission? (See Point III, *infra*.)

6. May the Court of Appeals, by misinterpreting the provisions of the Federal Power Act which control this proceeding, permit the Commission unreasonably and radically to change its well-settled rules and regulations by order in an adjudicatory proceeding? (See Point IV, *infra*.)

7. May the Commission, consistently with this Court's decision in *Speiser* v. *Randall*, 357 U. S. 513 (1958), impose burdens on the companies' speech which result in discriminatory treatment of such speech because the Commission considers that speech to be political? (See Point V, *infra*.)

8. Were the companies deprived of property without due process of law by the arbitrary downgrading of outlays which were demonstrated to have been chargeable as operating expenses? (See Point VI, *infra*.)

Amendments to Constitution, Statutes and Regulations Involved.

Amendments I and V of the United States Constitution, Section 301(a) of the Federal Power Act, 16 U. S. C. §825(a), Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §1009(e), and the applicable provisions of the Commission's rules and regulations, i.e., the provisions of its Uniform System of Accounts Prescribed for Public Utilities and Licensees, are set forth in the Appendix to this petition, at pp. 1a-5a.

Statement.

This proceeding was begun by a Commission show-cause order issued on August 1, 1958. That order questioned the "propriety" of accounting entries which recorded, as operating expenses, outlays for nine (later reduced to eight) advertisements published by the companies in national magazines. It directed the companies to "present any justification there may be" for those entries.

A hearing was convened on November 23 and 24, 1959, at which the trial examiner excluded all of the companies' evidence except for the qualifications of their 37 witnesses

and brief testimony as to formal procedures followed in administering the advertising program. All of the excluded evidence was, however, presented through sworn offers of proof and is in the record.

The companies' proffered evidence showed damaging competition from federal government power agencies, government supported rural electric membership corporations, state public utility districts and municipally operated plants, including active competition for customers, especially existing customers of the companies considering new locations (R. 339-342, 353-354, 529, 535-536, 567-600, 634-635, 649, 675-677, 697-698, 703, 757-769, 823-827, 835-843, 873, 906-910, 948, 973-974, 986-987, 1021). For example, advertisements promoting federal low-priced power appeared in many national magazines (R. 313) and the Bonneville Power Administration established special services to help public agencies acquire investor-owned utility systems (R. 262-263). Other competitive efforts included promotional press releases, booklets, motion pictures and even so-called comic strips, extolling government power and disparaging investor-owned power (R. 328-331, 339-352, 759-764, 1054).

Testimony also was offered showing numerous attacks on the good will of the investor-owned companies (R. 770-777, 846-849) and that the assertion, frequently made, that government power rates provided a "yardstick" against which to compare the companies' power rates implied waste and mismanagement on the part of the companies and ignored the tax and other advantages of government power (R. 325-331, 768-770, 806, 876-879, 882-883).

The proffered evidence showed that federal power operations are benefited by major tax privileges and other advantages denied to the companies; that the most significant of these advantages are (1) the omission

of federal income taxes, (2) with two exceptions (Hoover Dam and TVA), the omission of state or local taxes, and (3) financing based on government credit; and that these advantages have been primarily responsible for sales of government power for 30% to 40% less than taxpaying, privately-financed power (R. 254).

Witness after witness offered to testify that the questioned advertisements were published to meet this competition (R. 272-275, 356-357, 379). For example, the witness Van Meter, a vice president of the advertising agency in charge of preparing the advertisements, offered to testify that they were published to indicate to the customer that the tax differential is a significant reason why the companies' rates are higher than those of government utilities (R. 1085-1086).

Van Meter offered to testify that "where the tax burdens of competing suppliers of an identical product or service are so divergent as to make prices dramatically different, the supplier who has to collect the larger amount is forced to explain why" (R. 1084). He pointed to the signs on gasoline pumps showing the amount of tax collected. He offered to testify that here the competition involved "unique factors inherent in government competition" and that the companies had "to identify this competitor" in order to explain the competitive situation with which they were confronted and thus "give the reader a basis for judgment" (R. 1085). This and much other proffered evidence demonstrating that the tax differential made the so-called "yardstick" a dubious criterion showed that the advertisements were an effective answer to the innuendoes that investor-owned companies are overcharging their customers (R. 323-329, 875-876, 909-911).

Neither the Commission nor the Court below challenged the companies' proffered evidence which showed that the

advertisements (a) promoted their sales, (b) preserved their good will, (c) explained their rates, (d) protected their markets, and (e) benefited their customers. The Court of Appeals said, "The Commission did not question but that the proffered evidence would show that the advertising served other purposes such as meeting competition, protecting the companies' markets, and explaining the reasons for their rates to the companies' customers" (App., p. 34a).

Not a syllable of testimony was presented by any witness on behalf of the Commission staff or by any of the companies' millions of customers, security holders, employees or other persons interested in their operations.

In this accounting proceeding (which the Commission conceded involved the "propriety" of the questioned accounting), the Commission rejected, as irrelevant and immaterial, the admittedly competent testimony of (1) the academic dean of the American accounting profession, (2) partners in three of the nation's leading accounting firms, and (3) other qualified accountants. Their proffered testimony was that the classification of the questioned expenditures in Operating Expense Accounts 787.2 ("Advertising") and 801 ("Miscellaneous General Expenses"), or as business costs, was completely in accord with the Commission's System of Accounts and with generally accepted principles of accounting and that any other accounting treatment of them, such as classification in Account 538 ("Miscellaneous Income Deductions"), or out of income (as ordered by the Commission), would be contrary to the System of Accounts and in violation of those accepted accounting principles.

After having refused to hear oral argument on the merits, the Commission ordered that the outlays for eight of the questioned advertisements be classified to Account 538, or out of income, rather than to Accounts 787.2 or 801,

or as operating costs, as the companies had classified them. It said that those outlays were "political in character" and that the "advertisements themselves . . . afford the best and most conclusive evidence of their essential character." What made the advertisements "political in character," according to the Commission, is that "they deal with a political controversy, the private-public power dispute and *hence* involve the presentation of argument in matters of political controversy" (App., p. 57a; emphasis ours). The Commission, in effect, was saying that the companies' advertisements became "political in character" because the competition which the advertisements resisted was with the government and that such fact alone required a method of accounting different from that provided in its System of Accounts.

The Commission did not judge the propriety of the companies' accounting under the provisions of its System of Accounts. Although the Commission said that the advertisements bore "a doubtful relationship to rendering utility service," it excluded from the record all proffered evidence showing the intimate and proper relationship of the advertisements to rendering utility service and to the interests of consumers of such service.

Decision of the Court of Appeals.

In affirming the Commission, the Court of Appeals held that Section 301(a) of the Federal Power Act (authorizing the Commission to prescribe by rules and regulations a system of accounts "as necessary or appropriate for purposes of administration of this Act") conferred upon the Commission a virtually unlimited power to make administrative determinations of policy in adjudicatory proceedings and suggested a rather strict limitation upon the

Court's power to upset the Commission's action. The Court of Appeals thus read out of Section 301(a) any effective right of appeal from an order entered by the Commission pursuant to the hearing for which that section provides. The Court held that even though it might well disagree with the Commission's decision, it was required to affirm if there was any rational basis on which the Commission's decision could be sustained, and it found what it considered rational bases.

As to the companies' right to a hearing, the Court held that because the Commission's action was within the Commission's broad discretion, reversible error could not be predicated on the Commission's rejection, as irrelevant and immaterial, of the companies' mass of evidence that, under the Commission's own rules and regulations, the questioned expenditures were "just and reasonable" and were required to be accounted for as operating expenses.

The Court rejected the companies' First Amendment arguments on the ground that all that was involved was that the companies should take the questioned expenditures out of income rather than include them in business costs. But much more was at hazard. (See note 8, page 25, *infra*.)

Reasons for Granting the Writ.

A fair hearing, essential to the legal validity of administrative regulation and guaranteed by Section 301(a) of the Federal Power Act and the Fifth Amendment, was denied to the companies, contrary to many decisions of this Court, including *Morgan* v. *United States*, 304 U. S. 1 (1938). Plainly relevant and material evidence offered on their behalf by 37 competent witnesses was arbitrarily excluded.

The Court of Appeals erroneously failed to review the Commission's determination of questions of law, contrary to the decision of this Court in *NLRB* v. *Babcock & Wilcox*, 351 U. S. 105 (1956); it failed to apply the standard of substantial evidence established by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) and subsequent decisions; it gravely misconstrued an important provision of the Federal Power Act.

The Court of Appeals permitted the Commission to disregard its own applicable rules and regulations contrary to the requirements laid down by this Court in *Service* v. *Dulles*, 354 U. S. 363 (1957) and *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). By permitting the Commission drastically to alter its System of Accounts in an adjudicatory proceeding, the Court of Appeals' decision conflicts with the decision of the Court of Appeals for the District of Columbia in *American President Lines* v. *Federal Maritime Board*, F. 2d (decided May 24, 1962).

The Court of Appeals should have reversed the Commission for its discriminatory imposition of burdens on the companies' speech contrary to principles enunciated by this Court in *Speiser* v. *Randall*, 357 U. S. 513 (1958).

Fundamental questions significantly affecting the administrative process and its appellate review were wrongly decided in this case and freedom of speech was unreasonably abridged.

ARGUMENT.

I.

The exclusion of relevant and material evidence offered by the companies was a denial of the fair hearing to which they were entitled by statute and due process of law.

The Fifth Amendment, as consistently applied by this Court to administrative orders, requires a fair hearing, including the privilege of introducing testimony, and findings based upon substantial evidence. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937), and cases cited; *The Chicago Junction Case*, 264 U. S. 258 (1924); *ICC* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88 (1912).

In compliance with this constitutional command, Section 301(a) of the Federal Power Act permits the Commission to determine specific accounting questions, but only "after notice and opportunity for hearing."

In *Morgan* v. *United States*, 304 U. S. 1, 14-15 (1938), then Chief Justice Hughes said that the requirement of a fair hearing went to the very foundation of administrative action, that "rudimentary requirements of fair play . . . demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process," and that a fair hearing was an "inexorable safeguard."

This inexorable safeguard was flouted by the Commission and ignored by the Court of Appeals. Although a hearing was ordered, not a trace of evidence was offered by the Commission's staff or by a complainant, and the

evidence offered by the companies was excluded as "irrelevant and immaterial," although the Commission had ordered, as Section 301(a) required, that "at the hearing . . . each of the . . . Companies shall present any justification there may be for its . . . accounting entry or entries herein questioned" (App., p. 48a).

The justification of the accounting entries was put in issue by Section 301(a) itself. Their "propriety" was put in issue by the Commission's order to show cause. The relationship of the expenditures to the cost of furnishing electric utility service (e.g., in the interest of the companies' customers) was put in issue by the Commission's System of Accounts, which provides that costs of such service shall be charged to operating expense accounts.

The companies offered substantial and admittedly competent and credible evidence[1] to justify every accounting entry questioned, and particularly to demonstrate (1) the accounting "propriety" of the entries, (2) the business rather than political purposes of the expenditures, (3) the intimate relationship of the expenditures to the cost of rendering efficient electric utility service, and (4) the resulting benefit to the companies' customers. This evidence was excluded. Indeed, after the evidentiary question had been determined by the Commission, the Examiner frankly said, in answer to a question by counsel for one of the companies, that he could not conceive of *any* evidence that would be admissible under the Commission's ruling (R. 901-902).

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[1] The Court of Appeals stated: "The witnesses produced, 37 in number, made up an impressive list of business executives, accountants and auditors, deans and professors of schools of business administration, public utility financial advisors and security analysts, and presidents of electric power companies" (App., pp. 11a-12a).

The Commission's conjecture that "[b]y their nature, such expenditures obviously have a doubtful relationship to rendering utility service" (App., p. 60a) was wholly without support in the record and was made untenable by the companies' proffered evidence that their customers benefited from the questioned advertising expenditures. This evidence was aimed directly at establishing the immediate and proper relationship of such expenditures to the rendering of utility service.[2]

With no other evidence in the record, the Commission held that the advertisements alone justified its findings and that "no other evidence is necessary to confirm them" (App., p. 57a). The Commission's apparent doubt as to the validity of this conclusion is indicated by its assertion that it had considered the proffered testimony (the record contains 510 printed pages of offers of proof) and deemed it "lacking in sufficient weight" (App., p. 55a).

The total exclusion of the offered evidence, *not its weight*, is the constitutional issue. As the Court of Appeals

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[2] This evidence showed (1) substantial loads taken from the companies by government power operations (e.g., R. 597-601, 675-676, 683-686, 703, 836-837, 870-873, 1072-1073, 1084), (2) that the unit cost of electricity decreases as the number of customers a utility serves increases (R. 606, 649, 818-819, 883, 974, 1008), and (3) that the questioned advertisements aided the companies in retaining present customers and attracting new ones (R. 543, 592, 691, 702, 731, 783, 805, 819, 862, 914, 950, 976, 999, 1076), so that the challenged expenditures tended to reduce the unit cost of electricity and benefit the companies' customers (e.g., R. 606, 688, 862). The proffered evidence showed that the questioned advertisements tended to keep the cost of money, which is borne by ratepayers, at reasonable levels by assuring investors that the price differential between the companies' rates and government power rates was largely attributable to the companies' greater tax burden and not to inefficiency or mismanagement. The proffered evidence showed that, as competition became more intense, investor-owned companies became less desirable as investments and their cost of money rose markedly (e.g., R. 458, 460-461, 470, 828-829, 866-869).

for the Eighth Circuit said in *Donnelly Garment Co.* v. *NLRB*, 123 F. 2d 215 (1941), at 224:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point."

Admittedly competent and credible evidence bearing directly on issues raised by the controlling statute and by the Commission itself was excluded. The Commission's conclusions squarely conflicted with the evidence it excluded. The so-called "hearing", flouting constitutional and stautory guarantees, was a mockery—a clear denial of due process of law. As the Court of Appeals for the District of Columbia Circuit said in *Victor Products Corp.* v. *NLRB*, 208 F. 2d 834, 839 (1953), "A finder of facts cannot believe that which he first hears and then close his mind to all that comes thereafter". That is plainly what the Commission must have done.

II.

The Court of Appeals erred (1) in not directing the Commission to apply its own rules and regulations, which constituted the law applicable in this proceeding, and (2) in not reviewing the correctness of the Commission's determination of matters of law.

The Commission's order presented to the Court of Appeals a question of law arising under Section 301(a) of the Federal Power Act and the System of Accounts prescribed

by the Commission pursuant to that section. That question of law presented the applicability of provisions of the System of Accounts to the questioned expenditures.

Service v. *Dulles et al.*, 354 U. S. 363 (1957), involved a statute which provided that the Secretary of State might terminate the employment of any employee of the State Department or of the Foreign Service "in his absolute discretion," whenever he deemed "such termination necessary or advisable in the interests of the United States." The Secretary's discretion could hardly have been stated more broadly. While this Court recognized that the Secretary's administrative discretion was broader than the regulations he promulgated (Regulations of March 11, 1949, Secs. 391-96), it reversed the Court of Appeals and held that the Secretary was bound by his regulations and that Mr. Service's discharge was invalid because it violated those regulations. See also *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959) and *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954).

Section 301(a) provides "that the Commission may prescribe a system of accounts." The Commission prescribed a system of accounts. Having prescribed that system of accounts, the Commission is bound by it and must apply it in determining the particular accounts to which questioned outlays are to be charged.

The System of Accounts provided that "the total expenses . . . incurred by the utility in its electric operations" be classified as "operating expenses" (Account 502) and prescribed operating expense accounts (Accounts 701 to 809) "designed to show in detail the cost . . . of furnishing electric utility service" (Operating Expense Accounts Instruction No. 1). These prescribed "detail" accounts include one for advertising (Account 787.2) and one for miscellaneous general expense (Account 801). The System of Accounts also commanded that "all charges to

the accounts prescribed * * * for operating expenses shall be *just and reasonable*" and that payments "*in excess of just and reasonable* charges" be included in Account 538 (General Instruction 2F; emphasis added). The System of Accounts did not limit accounting for the questioned expenditures in any other way. In this proceeding, no claim has been made that such expenditures were not "just and reasonable".

Neither the Court of Appeals nor the Commission squarely determined whether the questioned expenditures constituted a part of the cost of furnishing electric utility service. Yet this was the critical issue on which the propriety of the companies' accounting turned. When the Commission disregarded its own rules and regulations, the Court of Appeals was required, *as a matter of law*, to direct the Commission to apply those rules and regulations.

The Court acknowledged that the questioned advertisements served the purposes of "meeting competition, protecting the companies' markets and explaining the reasons for their rates to the companies' customers" (App., p. 34a). Expenditures for them therefore plainly constituted operating expenses within the meaning of the Commission's System of Accounts. Any political connotation read into these advertisements was no more than incidental to the fact that the companies are in business competition with government power.[3] In these circumstances, such incidental polit-

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[3] *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (No. 1), 294 U. S. 63 (1935), involved, in part, the right of a utility's management to make advertising expenditures and treat them as a part of the cost of rendering service. The Ohio Commission struck down $7,000 of the $12,000 claimed by the company. Justice Cardozo, speaking for this Court, made it clear that the Commission could not do so under circumstances plainly analogous to those under consideration here. He said:

"* * * A public utility will not be permitted to include negligent or wasteful losses among its operating charges.

ical connotation was irrelevant under the provisions of the System of Accounts and the questioned expenditures were required to be accounted for as operating expense *as a matter of law.*

The Court of Appeals was required, on review, to make its own determination of this question of law. It did not make its own determination, although it acknowledged that it might well disagree with the Commission's determination (App., p. 25a). By failing to make its own determination, the Court of Appeals deprived the companies of that measure of review to which they were entitled. An administrative ruling which rests on an erroneous legal foundation cannot be sustained by a Court of Appeals. *NLRB* v. *Babcock & Wilcox*, 351 U. S. 105, 112-3 (1956); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 364-5 (1955); *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 80-81 (1953).

The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. *In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault.* . . . The Company made claim to expenses incurred in procuring new business or in the endeavor to procure it, such expenses amounting on the average to $12,000 a year. The Commission did not question the fact of payment, but cut down the allowance to $5,000 a year on the ground that anything more was unnecessary and wasteful. *The criticism has no basis in evidence, either direct or circumstantial. Good faith is to be presumed on the part of the managers of a business. . . . In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.* . . . The suggestion is made that there is no evidence of competition. *We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity.* . . . Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income *for rate purposes as for others.* . . ." (294 U. S. at 68, 72; emphasis added.)

III.

The Court of Appeals erred (1) in not reviewing the findings of the Commission to determine if they were based on substantial evidence and (2) in not reversing the Commission's decision because it was sharply contradicted and wholly unsupported by the record.

This case presented a factual record for review because the Commission said that it had examined the companies' offers of proof (App., p. 68a). The Commission's action required the Court of Appeals to apply the substantial evidence standard established in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951). But *Universal Camera* is not even cited in the opinion of the Court of Appeals.

The record examined by the Commission demonstrated that the outlays for the advertisements were just and reasonable expenses incurred by the companies in furnishing electric service. When the Commission closed the record in this case without offering any challenge to the companies' proffered and conclusive evidence that the questioned outlays had been accounted for in accordance with the System of Accounts, the Court of Appeals was required to reverse the Commission.

In *Universal Camera*, this Court specifically rejected the test that judicial review was exhausted "when the reviewing court could find in the record evidence which when viewed in isolation substantiated the Board's findings" (340 U. S. at p. 478). Here the Court of Appeals affirmed an order based upon the Commission's speculative and conjectural reading of the advertisements alone, although that speculation and conjecture were flatly contra-

dicted by proffered and uncontradicted evidence which the Commission said it examined. Compare *NLRB* v. *Ray Smith Transport Co.*, 193 F. 2d 142 (5th Cir. 1951).

IV.

The Court of Appeals erred in granting to the Commission discretionary power drastically to change its rules and regulations in an adjudicatory proceeding.

The Court of Appeals erred when it held that the Commission had the power to determine by order in an adjudicatory proceeding that particular expenditures were required to be charged in any manner which the Commission deemed "necessary or appropriate for purposes of the administration of this Act". The Court said "That is the sole guide and the only limitation upon the very broadly stated authority of the Commission to prescribe such a system and *to determine by order the accounts in which particular outlays shall be entered or charged*" (App., p. 15a; emphasis added).

Section 301(a) provides, however, that the companies "shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may *by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act.*" (Emphasis added.)

The statute further provides "that the Commission may prescribe a system of accounts . . ." and that "after notice and opportunity for hearing, [it] may determine by order the *accounts* in which *particular outlays* . . . shall be entered, charged, or credited." (Emphasis added.)

Section 301(a) *does not* grant the Commission authority to determine how particular outlays shall be charged as it deems "necessary or appropriate for purposes of the administration of this Act."[4].

The "necessary or appropriate" clause may be the sole guide and only limitation on the Commission's authority to prescribe the rules and regulations which constitute its System of Accounts. But the Commission had already prescribed a System of Accounts, and the companies relied on that System in making the questioned entries. When the Commission promulgated that System, it exhausted its rule-making authority until such time as it revised the System in accordance with rule-making procedures.

In fact, after this proceeding was commenced, the Commission did employ the proper procedure for rule-making when it proposed, and later adopted with certain changes, a revision of its Uniform System of Accounts (See Federal Register, May 14, 1959, Vol. 24, No. 94, p. 3905 *et seq.* and June 7, 1960, Vol. 25, No. 110, p. 5014 *et. seq.*).

Having twice exercised its rule-making powers without providing that operating expenses become income deductions when such expenses are made necessary by the competition of government power, the Commission, in this adjudicatory proceeding, drastically altered the System of Accounts and applied this new and unwarranted standard which cannot be found either in the old System of Accounts

[4] The Court of Appeals relied on *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949), saying that the "necessary or appropriate" language in Section 301(a) had "some resemblance" to the language construed in *Central-Illinois*. However, in *Central-Illinois*, the Securities and Exchange Commission was specifically authorized by Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. §79k(e)] to apply the statutory standard in adjudicatory proceedings, while Section 301(a) limits the "necessary or appropriate" standard to the Federal Power Commission's rule making authority. *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), is inapplicable for the same reason.

or the new System which became effective on January 1, 1961. This was a serious error of law which it was the duty of the Court of Appeals to correct. *American President Lines, Ltd. et al.* v. *Federal Maritime Board,* F. 2d (D. C. Cir. May 24, 1962).

If these advertisements had been directed at the retention and promotion of sales of electric energy as against gas distributing competitors, the outlays for them unquestionably would be allowable operating expenses. See *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio, supra.* In effect, the Commission has been allowed to make, by order and not by rule, a new rule that advertising expenditures, otherwise constituting operating expenses, cease to be operating expenses if the competitor is the government.

In the 17-year period between 1941, when the Electric Companies Advertising Program was commenced, and 1958, no question was raised as to the operating-expense character of any ECAP expenditure.[5] In 1958, however, the Commission said that the standards of its System of Accounts, which were fully met by the companies' proffered evidence, were to be supplanted by its *ad hoc* "political in character" test, and the Court of Appeals compounded that error when it held that the Commission need not have applied any standard whatever. The Court said that it "was within the competence of the Commission to give these particular advertisements a special classification and to deal with them whether by use of the word 'political' or some other term . . ." and that their separate classification "as 'Miscellaneous Income Deductions' for accounting purposes

[5] Indeed, in 1944, Commission accountants accepted Puget Sound Power & Light Company's participation in the ECAP program as a proper charge to operating expense and the Commission issued a commendatory press release on their report. The ECAP program at that time included an advertisement similar to certain of the advertisements questioned in this proceeding. (R. 1097-1108.)

is something we are not permitted to reverse" (App., p. 33a).

The Court of Appeals thus vested the Commission with virtually non-reviewable discretion drastically to change its regulations in adjudicatory proceedings. This is squarely in conflict with the *Service* and *American President Lines* cases, *supra*.

Moreover, even if the Commission has all the inherent adjudicatory powers attributed to it by the Court of Appeals, the fact is that the Commission's order to show cause initiating this proceeding invoked its System of Accounts, and for that reason alone it is bound by that System.

In *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959), this Court held that even though the Secretary of Interior had the summary right to dismiss an employee for no reason, if he based a dismissal on security grounds, he was constitutionally required to comply with the procedures of his own prior order regulating such dismissals.

V.

The Commission's order unreasonably abridges freedom of speech by imposing burdens resulting in discriminatory treatment of speech.

The Commission's order so construes Section 301(a) of the Federal Power Act and its own accounting regulations under that section that they become a law "abridging the freedom of speech" within the meaning of the First Amendment. It is not necessary that speech be prohibited in order to violate the First Amendment; it is violated if freedom of speech is unreasonably curtailed or abridged. The Commission's prohibition against treating as operating expense

the cost of answering the contentions of government-supported power agencies, which themselves remain free to treat the cost of their advertising against the companies as operating expense, constituted such an abridgment. This was particularly true where such prohibition was instigated by spokesmen for those government-supported power agencies[6] and where the Commission had been aware of the companies' accounting treatment of these advertising expenditures for at least 14 years, but had not questioned them until it launched this proceeding.

In *Speiser* v. *Randall*, 357 U. S. 513 (1958), this Court held that a California statute which required an applicant for tax exemption to show that he did not engage in certain forms of speech was a denial of due process and an unreasonable limitation on free speech.[7] Speaking for the Court, Mr. Justice Brennan said:

> "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech" (357 U. S., at 518).

It is clear that the power to tax cannot be wielded to restrict speech unreasonably, *Speiser* v. *Randall, supra; First Unitarian Church* v. *Los Angeles*, 357 U. S. 545 (1958); *Follett* v. *Town of McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943), vacating 316 U. S. 584 (1942); *Grosjean* v. *American Press Co.*, 297 U. S.

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[6] The Commission's files disclose that the only complaint addressed directly to it prior to the issuance of the show-cause order of August 1, 1958, which initiated this proceeding, was a single letter which appeared in two forms (Companies' General Exhibits Nos. 1 and 2).

[7] Section 301(a) of the Federal Power Act imposes on the companies the burden of proof to justify every accounting entry questioned by the Commission.

233 (1936), even when the action taken tends to cause a self-imposed restriction on speech. See *Smith* v. *California*, 361 U. S. 147, 151 (1959).

The Commission's power over the companies' accounts certainly is no broader than the power to tax. There is, therefore, no difference between the denial of Speiser's tax exemption "for engaging in speech" and the denial of the companies' right to treat operating expenses as such "for engaging in speech".

The clear discrimination in the case at bar sharply differentiates it from the nondiscriminatory denial of a tax deduction in *Cammarano* v. *United States*, 358 U. S. 498 (1959).

The tax regulation construed in *Cammarano* expressed "a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase as far as the Treasury of the United States is concerned" (358 U. S., at 513). As far as the government of the United States is concerned in this case, however, everyone in the utility business is not on the same footing. While the government was neither a "wet" nor a "dry" in *Cammarano*, in this case the government, acting in a proprietary capacity, and the power groups it supports, are active competitors and they obviously treat as operating expenses the moneys they spend to compete with the companies.

Again, expenditures to meet business competition are entitled to be accounted for as operating expenses. The expenditures here in question were, as the companies' proffered evidence showed, to meet business competition. Yet because, and solely because, the competitor was the government, the Commission has downgraded expenditures from operating expenses to income deductions. This

action plainly imposes a discriminatory and unreasonable burden on the companies' right to compete, by speech, with their governmental (and business) competitors.

The tax regulation denying the deduction in *Cammarano* had been repeatedly readopted by Congress and consistently construed by the courts for over 40 years. It constituted an expression of a sharply defined national policy. In this case there is no statute, rule or regulation setting forth any national policy which could possibly sustain the Commission's order. On the contrary, Congress left the companies free to compete with government power through advertisements of the type here in issue. The Federal Power Act and the Public Utility Holding Company Act of 1935 were adopted as parts of the Public Utility Act of 1935. The sole provision in these Acts affecting political expenditures is Section 12(h) of the Holding Company Act [15 U. S. C. §79 *l* (h)], which significantly provides that the only political expenditures subject to stricture are campaign contributions.

The only relevance of *Cammarano* is that it is completely consistent with the principle that the discriminatory denial of a right or privilege "for engaging in speech" contravenes the First Amendment.

It begs the question to say that all the Commission has ordered is that the companies show on their books that the eight advertisements be paid for "out of their own pockets rather than passed on to the consumer" (App., p. 35a).[8] The fact is that the companies' speech is deliber-

[8] Compare the statements of the Court of Appeals that the Commission's order has "a serious impact upon the petitioners," "appear[s] to put heavy burdens of proof" on them, and adds to their "burden of proof in state rate proceedings" (App., pp. 23a-24a). In addition, the Commission has made it clear that when expenses are "improperly charged . . . to operating expenses, it may be said that they [are] improperly charged against the ratepayers." See note 9, page 28, *infra*.

ately restricted, a restriction on speech not shared by the companies' government power rivals.

The companies are no more "subsidized" by charging the cost of their advertisements as operating expense than Speiser was "subsidized" when his tax exemption was restored. The companies have the constitutional right to meet the competition of the government acting in its proprietary capacity, through speech, without having the government, acting in its sovereign capacity, discriminate against that speech through arbitrary economic sanctions imposed at the instigation of spokesmen for the government's proprietary power activities who obviously wished to restrict that speech.

In *United States* v. *Harriss*, 347 U. S. 612 (1954), this Court construed the Federal Regulation of Lobbying Act (2 U. S. C. §§261-70) narrowly to avoid constitutional doubts. Those doubts concerned the power of Congress to inhibit the dissemination of information to the public by demanding reports. On its face, the statute required reports to Congress of any person who "directly or indirectly" solicited or received money "to be used principally to aid, or the principal purpose of which person is to aid" the passage or defeat of any legislation or "to influence, directly or indirectly, the passage or defeat of any legislation . . ." Notwithstanding that language, this Court held that the statute applied only to direct communication with members of Congress. Violation of the First Amendment by requiring registration or reports from those disseminating information to the public on controversial matters is far less oppressive than the Commission's order here requiring the companies to treat the cost of their advertisements as non-operating expenses. See *Thomas* v. *Collins*, 323 U. S. 516, 538-539 (1945).

If, as Commission counsel has said (App., p. 24a), all the Commission wants is to flag the expenditures for these advertisements with a yellow light, it could do so without violence to the First Amendment by flagging the expenditures in an operating expense account. The operating expense accounts "designed to show in detail" the cost of furnishing electric service (Operating Expense Accounts Instruction No. 1) surely contain less of the "hotchpotch" the Commission feared than Account 538 "Miscellaneous Income Deductions" (App., pp. 4a-5a). The Commission had a clear constitutional alternative which it wrongly chose to ignore. See *Eastern R. R. Pres. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 141 (1961).

VI.

The companies have been deprived of property without due process of law.

An investor-owned utility regulated by public authority has the right to an opportunity to recover from its customers just and reasonable expenses incurred in its electric operations, plus a reasonable return on its property used and useful in the public service. Only unjust and unreasonable charges or charges unrelated to furnishing electric service may not be included in the costs borne by the beneficiaries of such service. See *A. T. & T. Co.* v. *United States*, 299 U. S. 232, 246-247 (1936). These fundamental principles find expression in the Commission's System of Accounts, its Account No. 538 plainly having been based upon a substantially identical telephone account considered in the *A. T. & T.* case.

The return to which a utility may be entitled is determined by the application of an appropriate "rate of return" to the utility's "rate base," and generally speak-

ing, in the absence of a showing of confiscation, that determination stands. Here we are not concerned with this aspect of the rate-making process.

The next step is the comparison of this return with the actual return of the utility. If a regulatory agency's disallowance of an operating expense is illegal or improper, there is a taking of property without due process of law.

In the instant case, the Commission disallowed the questioned advertising expenses illegally and improperly. When an operating expense is disallowed it stays disallowed for accounting as well as rate making purposes. The Commission admitted as much in two separate reports it submitted to Congress in 1957.[9]

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[9] The Public Works and Resources Sub-committee of the Committee on Government Operations of the House of Representatives requested the Commission "to report upon whether the expenses incurred by the utilities in connection with the preparation, printing and distribution of the pamphlet(s). ["Turn on the Light" and "The Federal Power Program, its Background, Growth and Consequences"] 'are properly charged against the rate payers'." The Commission answered:

> "In any rate proceeding the regulatory commission attempts to fix such rates as will collect from the customers the 'cost of service' which includes the utility's operating expense, depreciation, taxes and a reasonable return upon its investment of plant in service and upon an allowance for working capital. Thus it can be said that the customers are expected to pay the utility's operating expenses and in that sense any amounts charged to operating expense accounts of the utilities are charges against the ratepayers. Accordingly, since the expenses in connection with the pamphlet *were improperly charged by the 58 companies to operating expenses, it may be said that they were improperly charged against the ratepayers.*
>
> • • •
>
> "With respect to the expenditures in question which have been improperly accounted for, each of the companies which is subject to the Commission's jurisdiction will be notified that the costs of the pamphlet may not be accounted for as operating expenses, and they will be required in connection with future expenditures of similar nature to exclude such costs from operating expense accounts." (R. 1110; emphasis ours.)

The amounts involved are comparatively small, but the principle is consequential. If the Commission's order is permitted to stand, the companies will be deprived of property without due process of law in violation of the Fifth Amendment.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 462

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. .....

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

APPENDICES.

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APPENDIX A.

Amendments I and V of the United States Constitution.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix A.

Section 301(a) of the Federal Power Act, 16 U. S. C. §825(a).

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

Appendix A.

Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §1009(e).

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Appendix A.

Excerpts from Uniform System of Accounts Prescribed for Public Utilities and Licenses.

Instructions—General.

2. RECORDS.

F. All charges to the accounts prescribed in this system for electric plant, income, operating revenues, and operating expenses shall be just and reasonable, and any payments by the utility in excess of just and reasonable charges shall be included in Account 538, Miscellaneous Income Deductions.

Instructions—Operating Expense Accounts.

1. PURPOSE OF OPERATING EXPENSE ACCOUNTS.

The operating expense accounts (701 to 809) are designed to show in detail the cost (except depreciation, amortization, certain property losses, and taxes) of furnishing electric service. (See general instructions 6 and 7).

Income Accounts.

502. OPERATING EXPENSES.

Under this caption shall be included the total expenses shown in accounts 701 to 809, incurred by the utility in its electric operations during the period covered by the income account.

538. MISCELLANEOUS INCOME DEDUCTIONS.

This account shall include miscellaneous debits to income, not provided for elsewhere.

ITEMS

1. Decline in value of investments. (See Balance sheet instruction 4.)

2. Donations.

Appendix A.

3. Expenditures for associated companies for which the utility will not be reimbursed.

Operating Expense Accounts.

787.2. Advertising.

This account shall include the cost of labor and materials used and expenses incurred in connection with advertising for the purpose of promoting the sales of electricity.

Note.—Do not include in this account advertising in connection with merchandise or appliance sales.

ITEMS

1. Advertising in newspapers, periodicals, etc.
2. Advertising manager and assistants.
3. Clerks.
4. Materials and expenses in preparing:
   (*a*) Advertisements.
   (*b*) Booklets.
   (*c*) Bulletins.
   (*d*) Dodgers.
   (*e*) Posters.
5. Stenographers and typists.

801. Miscellaneous General Expenses.

This account shall include such items of expense applicable to the electric department as the cost of publishing and distributing annual reports to stockholders; advertising notice of stockholders' meetings; dividend and other corporate and financial notices of a general character; association dues; contributions for conventions and meetings of the industry; cost of research and experimental work conducted for the benefit of the electric department or the industry or for the improvement of electric service (except such amounts as may be properly chargeable to other accounts); fees of transfer agents, registrars of stock, and fiscal agents; director's fees; and any other miscellaneous expenses connected with the general management and not otherwise provided for.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18667

SOUTHWESTERN ELECTRIC POWER COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 18669

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 18672

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission.

(May 16, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

* From the Ninth Circuit, sitting by designation.

Appendix B.

POPE, Circuit Judge: This matter is before us upon petitions of some 63 companies engaged in the business of selling and distributing electric power, seeking review of a certain order of the Federal Power Commission issued August 17, 1960.

The order in question required the respondents before the Commission, including the petitioners here, to reclassify a portion of the expenditures made by them for certain advertisements by placing them in an accounting classification specified by the Commission. Orders denying petitions for rehearing were issued October 11, 1960, after which these petitions were filed in conformity with §313(b) of the Federal Power Act, (16 U.S.C. §825-1(b)).[1]

Beginning late in 1956, continuing through 1957, to early 1958, these Electric Power companies were participating in an "Electric Companies Advertising Program" (ECAP) in behalf of "America's independent electric light and power companies." The eight advertisements here involved,[2] most of them illustrated, are similar in that they develop this theme: a substantial portion of the sums paid for electricity by customers of private electric light and power companies goes for taxes; people who get their electricity from federal government electric systems have included in their bills either nothing for taxes or else only a very small amount, since, generally speaking, the government systems are not taxed; you, who use private power pay taxes used to help build the federal plants; in effect you are helping to pay the electric bills of those who buy the public power; this is unfair tax favoritism. The advertisements then conclude with inquiries, varying from "Don't you think something ought to be done about this unfair tax favoritism?" to "Don't you think this unfair tax favoritism needs thorough study and discussion?" A sample of these advertisements is

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[1] The petitions also invoke the provisions for review of §10 of the Administrative Procedure Act, (5 U.S.C. §1009).

[2] The Initial Order to Show Cause described nine advertisements, Nos. 1 to 9, inclusive. The final order required reclassification of the expenditures for eight only, Nos. 2 to 9.

described in the margin.[3] They appeared, during the period mentioned, in various weekly and monthly magazines such as *Life, Look, Colliers, The Saturday Evening Post, Atlantic, Saturday Review of Literature,* and a few others.

On August 1, 1958, the Commission issued an order setting forth the amounts which each of the seventy-six electric power companies named therein had contributed to the ECAP advertising program for 1957, and disclosing how these sums had been classified by the companies, under the Commission's Uniform System of Accounts.[4] The order fixed a time and place for hearing, at which each of the companies was ordered to show cause why a stated portion

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[3] "WHY DO CUSTOMERS OF *THIS* POWER DAM . . .

(Here appears a picture of a power dam below which is inscribed: "This power dam was built on the Susquehanna River near the Pennsylvania-Maryland border by the local independent electric light and power company at no cost to taxpayers.")

"HAVE TO HELP PAY ELECTRIC BILLS FOR CUSTOMERS OF *THIS* ONE?"

(Here appears a picture of another dam, beneath which appears: "This TVA dam was built on the Tennessee River near Paducah, Kentucky, by the federal government with millions of dollars that you and other citizens paid in taxes.")

"Your taxes help *build* federal government power plants like the one in the lower picture. And these plants *keep* on costing you money year after year. Here's how: About 23¢ of every dollar you pay for electricity from our independent electric light and power company goes for taxes. But because of present tax laws, customers of federal power systems escape paying most of the taxes in *their* electric bills that you pay in *yours*. They pay taxes of only about 4¢ per dollar if their power comes from the federal government's TVA power system, for example. So to make up for the lost tax revenues which federal power projects *don't* pay, you have to be taxed more. Is it fair for you to have to pay extra taxes like this for customers of federal government power systems? Shouldn't something be done about it? America's Independent Electric Light and Power Companies."

[4] Some had entered these items under account No. 787, "Demonstration, Advertising, and Other Sales Expenses", and some under account No. 801, "Miscellaneous General Expenses".

of such expenditures should not be reclassified to account No. 538—"Miscellaneous Income Deductions".[5]

This Uniform System of Accounts was prescribed by the Commission for all licensees[6] and public utilities[7] subject to the provisions of the Federal Power Act, (49 Stat. 838). The establishment of such system is authorized by §301(a) of Part III of the Act, (16 U.S.C. §825a) which provides that the Commission "may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class." The entire subsection is set forth in the margin.[8]

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[5] This order described nine advertisements including the eight previously mentioned. The sum sought to be reclassified was that part of the ECAP total expenditures represented by the nine ads described.

[6] That is, persons licensed under §4 of Part I of the Act. (16 U.S.C. §797).

[7] That is, electric utility companies engaged in interstate commerce, as defined in §201 of Part II of the Act. (16 U.S.C. §824)

[8] "§301.(a) Every licensee and public utility shall make, keep and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administation of this Act, including accounts, records and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof."

Appendix B.

The proceeding initiated by the Order to Show Cause, and under review here, was undertaken pursuant to that part of this same section which provides: "The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof."

The Order to Show Cause stated the ground on which the accounting entries in accounts Nos. 787 and 801 were questioned by the Commission as follows: "The staff recommends the reclassification of the amounts [expended for the nine advertisements referred to in footnote 5, supra] to Account No. 538, Miscellaneous Income Deductions, for the reason that the expenditures involved relate to the matter of private versus public ownership of electric facilities, a subject of political controversy, and the above-listed copy is of an argumentative character or nature in that controversy. . . . By separate letters of the Commission dated February 27, 1958, each of the above Companies was advised that in the opinion of this Commission expenditures involving the presentation of argument in matters of political controversy are not properly includible in any of the 700 or 800 Series of Accounts of the Commission's Uniform System of Accounts but rather should be classified in Account No. 538."[9]

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[9] In the Commission's System of Accounts, under No. 787, subdivision "787.2 *Advertising*" appears the following: "This account shall include the cost of labor and materials used and expenses incurred in connection with advertising for the purpose of promoting the sales of electricity." * * "*ITEMS* 1. Advertising in newspapers, periodicals, etc. 2. Advertising manager and assistants. 3. Clerks. 4. Materials and expenses in preparing: (a) Advertisements. (b) Booklets. (c) Bulletins. (d) Dodgers. (e) Posters. 5. Stenographers and typists."

Account No. 801 is described as follows: "Miscellaneous General Expense. This account shall include such items of expense appli-

It is to be noted that such a change of classification would be to mark these expenditures as deductions from income rather than as charges to operating expenses.

At the outset of the hearing before an examiner the respondent companies produced a large number of witnesses through whose testimony they sought to adduce proof that the classification of these expenditures in either account 787 or 801, as operating expenses, was proper. The evidence thus offered was described in the Commission's opinion as follows: "In summary, this evidence was intended to show that the questioned advertising expenditures were necessary to counter the competition of government owned and subsidized electric power facilities and to protect respondents' businesses from such competition; that therefore such expenditures were ordinary, necessary, and just and reasonable expenses in the operation of the respondents' businesses; and that accordingly, within the meaning and intent of our System of Accounts, they should be classified to either or both accounts 787 and 801, as proper operating expenses."

The witnesses produced, 37 in number, made up an impressive list of business executives, accountants and auditors, deans and professors of schools of business admin-

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cable to the electric department as the cost of publishing and distributing annual reports to stockholders; advertising notice of stockholders' meetings; dividend and other corporate and financial notices of a general character; association dues; contributions for conventions and meetings of the industry; cost of research and experimental work conducted for the benefit of the electric department or the industry or for the improvement of electric service (except such amounts as may be properly chargeable to other accounts); fees or transfer agents, registrars of stock, and fiscal agents; director's fees; and any other miscellaneous expenses connected with the general management and not otherwise provided for."

Account 538 is described as follows: "538. Miscellaneous Income Deductions. This account shall include miscellaneous debits to income, not provided for elsewhere. ITEMS 1. Decline in value of investments. (See Balance sheet instruction 4.) 2. Donations. 3. Expenditures for associated companies for which the utility will not be reimbursed."

istration, public utility financial advisors and security analysts; and presidents of electric power companies. In every case, after the witness had stated his qualifications, objections were sustained to his further testimony; but in each case the witness submitted his testimony through a sworn offer of proof, and all of this is contained in the record.

The examiner's exclusion of this evidence was appealed to the Commission, which upheld the examiner's ruling. Petitioners here assert that this proffered evidence should have been received; that it would demonstrate that these expenditures were ordinary, necessary, just and reasonable in the operation of the companies' businesses and intended to promote the sale of electricity, and enhance the companies' credit standing. They further contend that the opinion testimony of the accountant witnesses demonstrates that their entries of these expenditures in accounts 787 or 801 was in line with sound and standard accounting procedures.[10]

In its ruling as to the admissibility of this evidence, both on appeal respecting the evidence question, and in its final order, the Commission held that the one issue in the pro-

[10] In general, the tendered evidence was to the effect that these companies had been and were confronted with widespread and vigorous competition from agencies interested in the promotion of the sale of government power, characterized by a disparaging of investor-owned power and an extolling of the virtues of public power; that the government's installed power capacity had grown from less than one percent of all electric utilities in 1933 to 17.3 per cent in 1958, when the government had become the nation's largest single producer, that the government competition was damaging because its operation enjoyed exemption from the payments which the companies were required to pay, so that this tax-free power could sell for 30% to 40% less than tax-paying privately-financed power. These witnesses would testify that these advertisements were necessary and proper to meet this competition; and that when their customers had this tax discrimination explained to them, they were likely to be favorably impressed with the companies' story and more inclined to stay with them.

ceeding was "whether respondents' questioned advertising expenditures were political"; that "only evidence relevant to [that] issue . . . should be admitted in evidence"; that the evidence proffered was "without probative value to show the contrary", that it was "not relevant to the issue of whether the advertisements were political, but was directed to other subsidiary issues, such as whether the advertisements were ordinary and necessary operating expenses"; that "assuming the relevancy of this proffered evidence it was lacking in sufficient weight to prove that the advertisements were in fact non-political."[11]

At this point we should consider the petitioners' initial contention that the Commission's own rules and regulations required it to receive this proffered evidence and receiving it to conclude that the expenditures here in issue were not such as to be properly included in Account 538. This contention is based upon the language of paragraph 2F of the Commission's general instruction relating to its uniform system of accounts which reads as follows: "F. All charges to the accounts prescribed in this system for electric plant, income, operating revenues, and operating expenses shall be just and reasonable, and any payments by the utility in excess of just and reasonable charges shall be included in Account 538, Miscellaneous Income Deductions." Petitioners say that the only charges included in Account 538 are those payments by the utility in excess of just and reasonable charges; that their offered evidence established conclusively that the payments for the advertising here in

[11] Notwithstanding this ruling, the Commission did take note of some of the testimony, as contained in the offers of proof which were under oath. Its opinion recites: "As to the relatively small amount of opinion testimony sought to be adduced by respondents that the advertisements were 'non-political', we have considered with care this evidence, which is in the record before us. And we have concluded that, in view of the self-evident facts attested by the advertisements themselves, this evidence too, even when to it is added all the other evidence proffered by the respondents, is of insufficient weight to establish that the advertisements are in fact non-political in character."

question were just and reasonable and that therefore they were not "in excess of just and reasonable charges", and hence that they should not be included in Account 538.

This argument is based upon the assumption that Instruction No. 2F must be read to mean that the *only* items to be included in that account are expenses in excess of just and reasonable charges.[12]

We cannot agree that these are the only charges properly assigned to Account 538. All that can be said is that such charges are, under paragraph 2F, properly placed in that account.[13] The regulations themselves appear to contemplate the probability that new questions of proper classification of expenditures will arise from time to time, for General Instruction No. 4 provides for the submission of such questions to the Commission for consideration and decision.[14]

When we read the provisions of §301 (a), footnote 8, supra, we note that the Commission is authorized to exer-

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[12] The brief of petitioners in Nos. 18669 and 18672 states: "Expenditures having their basis in operations are includible in these 'below-the-line' accounts only when and if they cease to be 'operating expenses' because they are 'in excess of just and reasonable charges', as provided in General Instruction 2.F."

[13] As disclosed by the description of account No. 538, contained in the Commission's regulations setting up its uniform system of accounts (see footnote 9, supra), other items are there listed as appropriately belonging under account No. 538; and General Intruction No. 5 recites: "Lists of 'items' appearing in the texts of accounts or elsewhere herein are for the purpose of more clearly indicating the application of the prescribed accounting. The lists are intended to be representative but not exhaustive." Such a statement is obviously essential in the setting up of a complete set of accounts, for in the course of administration of an Act of this kind, over a period of years, it is inevitable that from time to time the Commission would be confronted with new situations arising out of expenditures not previously considered by the Commission for which some appropriate place must be assigned.

[14] "4. Submission of Questions: To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision."

cise its authority to prescribe a system of accounts "as necessary or appropriate for purposes of administration of this Act." That is the sole guide and the only limitation upon the very broadly stated authority of the Commission to prescribe such a system and to determine by order the accounts in which particular outlays shall be entered or charged.

It may be noted that this language authorizing the Commission to take action "as necessary or appropriate for purposes of the administration of this Act" appears to confer upon the Commission a broad power to make administrative determinations of policy. This language has some resemblance to the language construed by the Supreme Court in *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96, where the Court was considering to what extent a court had power to review or alter a plan for dissolution submitted under the Public Utility Holding Company Act of 1935 and approved by the Securities and Exchange Commission. There the Commission was authorized to approve such a plan if, after notice and opportunity for hearing, it "shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan." Significant in that case was the broad scope of the quoted words: "Necessary to effectuate the provisions of subsection (b)". In our case we have similarly broad phraseology, also indicating a grant of policy making power, namely, "as necessary or appropriate for the purposes of the administration of this Act."

That language, read in the light of the decision in the *Central-Illinois* case, supra, suggests a rather strict limitation upon our power to upset the Commission's action. "Administrative determinations of policy, often based upon undisputed basic facts, in an area in which Congress has given the agency authority to develop rules based upon its expert knowledge and experience, are exemplified by

Securities and Exchange Commission v. *Chenery Corp.*, supra, in which the Commission determined that preferred stock purchased by management in the over-the-counter market during the formulation of a holding company reorganization plan could not be exchanged for common stock participation in the reorganized company, as could other preferred stock; instead management was to be paid cost plus interest for the preferred stock so purchased. The Commission's determination was made in the exercise of its duty to determine that a plan is 'fair and equitable' within the meaning of §11 (e) and that it is not 'detrimental to the public interest or the interest of investors or consumers' within the meaning of §7 (d) (6) and §7 (e). On certiorari to the Court of Appeals which had reviewed the Commission's order under §24 (a) of the Act, we held that the Commission's action was 'an allowable judgment which we cannot disturb.' 332 U. S. 194 at 209. This holding was . . . based upon the ground that the Commis. 's determination was made in an area in which Congress had delegated policy decisions of this sort to the Commission, and therefore that the agency determination was 'consistent with the authority granted by Congress.'" (338 U. S. at 127)

This suggestion that the language of §301 (a), which authorized the Commission in prescribing a system of accounts to do so "as necessary or appropriate for purposes of the administration of this Act" was intended to confer a measure of administrative policy making upon the Commission, is to an extent reinforced by other sections of the same Act. Thus in §311 of the Federal Power Act, (16 U. S. C. §825j) it is provided that the Commission is authorized to conduct investigations "regarding the generation, transmission, distribution and sale of electric energy, however produced . . . whether or not otherwise subject to the jurisdiction of the Commission," and to do this in order "to

secure information necessary or appropriate as a basis for recommending legislation."[15]

In the process of inquiring whether the Commission may appropriately require expenditures for advertisements such as these which the Commission described as "argument in matters of political controversy", to be separately and specially listed in the Uniform System of Accounts, we may well consider whether such special treatment of such expenditures would not be an appropriate way in which to assemble information as a basis for a possible recommendation for legislation upon this subject. An authority to recommend legislation seems to be a grant of power to inquire into almost any subject related to the accounting practices of electric utilities.

Another section of the Act which is relevant in determining what may be "necessary or appropriate for purposes of administration of this Act", is §209(c) (16 U. S. C. §824h (c)), which recites that "The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public

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[15] "§311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section."

utilities." As we shall note hereafter, there is a sharp difference of opinion between the petitioners and the Commission as to the extent to which the order herein reviewed is a rate regulation.[16] However, the language just quoted from §209c would appear to have reference to contemplated rate hearings before State commissions.

The legislative history of the Federal Power Act, to which we shall have occasion to refer hereafter, contains references to some examples of large expenditures by electric power companies designed to resist enactment of legislation opposed by those companies. For instance, reference was made to large sums expended by one of the petitioners here to defeat certain legislation pending in the State of Washinton. While no issue is raised in this case as to whether any of the expenditures by ECAP for advertisements were excessive in amounts, the Commission could well consider it advisable or appropriate to see to it that the accounts were set up in such manner that the State commissions could readily ascertain just how much had been expended upon political activities or advertising in relation thereto. This would seem to suggest a general authority in the Commission to require such expenditures to be specially listed and accounted for so as to be readily identified in connection with a state or other rate proceeding. It could well be argued that such information would "be of assistance in State regulation of public utilities."

§205c, (16 U. S. C. §824d(c)), requires every public utility (as defined in the Act) to file with the Commission sched-

[16] The opinion which accompanied the Commission's order here, recited: "Of course, the question of whether the rate payer or the shareholder shall ultimately pay these particular expenses must await rate proceedings under the Act, for an accounting classification matter of this kind does not involve determining the just and reasonable rates for the utility."

Petitioners' brief, previously referred to, states: "We submit that any distinction between this so-called accounting reclassification proceeding and a rate case, in so far as the expenditures under review are concerned, is chimerical."

ules of rates and charges "and the classifications, practices and regulations affecting such rates and charges". Also, §206b, (16 U. S. C. §824e (b)), provides that the Commission "may investigate and determine the cost of production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate covering the sale of such energy." If the Commission may inquire into "practices . . . affecting such rates and charges", and investigate "the cost of production", it would appear that a requirement of special classification in the accounts of expenditures related to matters of political controversy would be in order, and appropriate for these purposes.[17] . . . If we then conclude that the Commission was authorized by the Act to make special provision for the classification under its uniform system of accounts of expenditures, such as those for these advertisements, the next inquiry to be made is whether it was within the power or authority of the Commission, through the order here in question, to require such expenditures to be placed in Account No. 538 under the heading of "Income Deductions."

In its opinion accompanying the order here under review, the Commission referred to and cited as precedent for its decision, an interpretive ruling referred to as "Interpretation E-110, Issued Nov. 27, 1945". The text of that ruling, in question and answer form, appears in the margin.[18] This

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[17] Other sections of the Act grant powers which would permit consideration of the proper accounting for expenditures such as those here in controversy. These are the sections authorizing the Commission to determine what are "excessive profits" of licensees, (§10(d)), (16 U.S.C. §803(d)), and to regulate the rates of licensees (§§19 and 20) (16 U.S.C. 812, 813), and public utilities, (§205(a)), (16 U.S.C. 824d(a)). The setting up of appropriate accounting procedures would appear to be a logical preliminary to rate fixing.

[18] "Question: What is the proper account to be charged with non-promotional advertising of the type sometimes referred to as institutional advertising or as goodwill advertising, the purpose of which is to foster and maintain public goodwill rather than

ruling was actually issued as a part of Bulletin No. 7 of the National Association of Railroad and Utilities Commissioners and was prepared by that Association's Committee on Statistics and Accounts. The records of the Commission show that it, as in the past, considered such rulings of that Association as acceptable rulings with respect to its own system of accounts.

Petitioners vigorously assail Interpretation E-110 as having no validity in this proceeding. They assert that it was not promulgated as a rule or regulation of the Commission; was never published in the Federal Register; that it lay dormant without citation or action following its promulgation for years during which expenditures similar to the ones here involved had been charged to Account No. 787 without question by the Commission. It is said that the National Association of Railroad and Utilities Commissioners itself dropped the ruling by eliminating it from its own reports.

We think there is no occasion to discuss the question whether "Interpretation E-110" was a part of the rules and regulations of the Commission. The Commission could appropriately refer to it in the same manner in which it might refer to a textbook on accounting or to a decision of a state or federal court, or to a decision of a state utilities commission. The Commission's reference to that interpretation was sufficient to show that at the time of the issuance of the interpretation persons informed in this field were of the view that the cost of advertising for purposes

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for any immediate and direct promotion of sales of electricity or appliances?

"Answer: Such advertising should be charged to Account 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, approval or revocation of franchises, for the purpose of influencing decisions of public officers; or having any direct or indirect relationship to political matters."

mentioned in said ruling should be charged to Account No. 538.[19]

As we have previously noted, the parties here are in sharp disagreement as to just what the Commission's order does and as to what its effect will be. See footnote 15, supra. The petitioners challenge the statement of the Commission quoted above, in that footnote, to the effect that who shall ultimately pay these particular expenses must await rate proceedings and that "an accounting classification matter of this kind does not involve determining the just and reasonable rates for the utility." The petitioners say in their brief: "When a particular item of operating expense is forced 'below the line' it stays there."[20]

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[19] No problem arises under §3 of the Administrative Procedure Act, (5 U. S. C. §1002), relating to publication in the Federal Register. The order here under review related solely to the proper accounting of expenditures for eight specific advertisements. This was not an order of general applicability. It was a ruling directed solely to certain named respondents requiring action by them alone. Reconstruction Finance Corp. *v.* United Distillers Products Corp., 113 F. Supp. 468, 481, aff. 204 F. 2d 511, (2 cir.); Brownell *v.* Schnering Corp., 129 F. Supp. 879, 904-5, affirmed 228 F. 2d 624, (3 cir.).

In the case of Securities Comm'n. *v.* Chenery Corp, 332 U. S. 194, 202, the Supreme Court made it plain that a commission such as this may carry out its function either by general rule to be applied in the future, or by *ad hoc* adjudication through an individual order. The latter is the sort of ruling which we have before us here.

[20] On oral argument counsel for petitioners in answer to a question from the bench as to whether they would not have a full day in court to challenge the merits of the order, when rate making comes before the Commission, replied, "No, when they are kicked in the teeth, we submit that they stay kicked in the teeth, and that is what these people are trying to do."

We note that subsequent to the order here involved, the Commission issued a revised system of accounts, effective January 1, 1961, which contains an Account No. 426, apparently intended to replace Account No. 538. It is described as follows: "This account shall include miscellaneous expense items which are nonoperating in nature but which are properly deductible before determining total income before interest charges." Attached is a footnote as follows: "Note: The classification of expenses as nonoperating and their inclusion in this account is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes."

Appendix B.

Of course the order here under review does not prohibit these advertisements; there is no order to cease or desist from their publication. The Commission expressly stated that the accounting classification called for by the order "does not involve determining the just and reasonable rates for the utility."[21] In support of this view, the Commission cited *Northwestern Company* v. *Power Comm'n.*, 321 U. S. 119, 123.[22]

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[21] The Commission's opinion also stated: "And since these accounting classifications proceedings do not disturb any of the respondents' property or other rights, which are subject to determination not here but in rate proceedings, there is no deprivation of property without due process of law." Commissioner Kline, concurring in the earlier opinion upholding the exclusion of the proffered evidence, stated: "In a rate proceeding, items above the line are often disallowed as proper charges against the rate payer. Likewise in a rate case, items entered below the line as proper, necessary, just and reasonable outlays may be allowed as a part of the cost of service. On the ground that this is not a rate case and that a rate case is a better proceeding in which to raise the matters here sought to be resolved, I concur with the majority."

[22] The Northwestern Company case was similarly cited in Pacific Power & Light Co. *v.* Federal Power Commission, 9 cir., 141 F. 2d 602, 604, where the court had under review an order of the Commission requiring a certain entry in the electric plant accounts of Pacific Power to be charged to income over a ten year period. The Company claimed that compliance with the order of the Commission would distort its base for rate making purposes. As to this contention the court said: "This is not a proceeding for the fixing of rates". It stated: "The present case, like that involving the Northwestern Electric Company, appears to us to present no more than a problem of proper accounting". The court also noted, as did the Supreme Court in the Northwestern Company case, supra, at p. 124, "Nothing in the statute or the order prevents Northwestern keeping other accounts if it so desires which will give information with regard to estimated present appreciated value of its assets." (In each case the Commission had made orders requiring the elimination of appreciated assets.) Cf. Alabama Power Co. *v.* Federal Power Commission, 5 cir., 134 F. 2d 602, 611: "The Commission's accounts do not at all affect the State rates. If in the future federal rates are fixed it will be time enough to decide what effect the Commission's accounting orders are to have."

Appendix B.

The Commission argues that the order here involved simply implements the primary purpose of §301 which was to provide for "regulation by the informatory process". It was noted that some of the respondents were companies which have no rates subject to regulation by the Commission, but nevertheless the companies may be subject to the regulation provided by §301 as licensees and in such cases compliance with the requirements of the Commission's system of accounts in the respect here involved would serve to alert State Commission and investment agencies to the fact that in the opinion of the Commission these advertisements were political in character and their treatment as costs of service was dubious.[23]

There is no question here but that the order to classify these expenditures in account No. 538 has a serious impact upon the petitioners. Counsel for the Commission concedes that they are aggrieved persons, which implies that the order, even if it is not conclusive, with respect to rate determinations, would appear to put heavy burdens of proof upon the petitioners whenever they are confronted with rate hearings. They could, as the *Northwestern Company* case, supra, suggested they might, keep other accounts. They would be at liberty to argue before the State regulatory authorities that these expenditures were properly charged as a part of the cost of service and as operating expenses. Yet the fact that these accounts which conformed to the Commission's uniform system of accounts would show these expenditures listed under income accounts and "below the line", would add to any such company's burden of proof in

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[23] Commission counsel refer to the Federal Regulation of Lobbying Act, 2 U. S. C. 261-269, and portions of the Federal Corrupt Practices Act, 2 U. S. C. §§243-247, as illustrations of "regulation by the informatory process."

state rate proceedings. The Commission's counsel conceded that this was the intended purpose of the order.[24]

Assuming that the Commission had authority to give special treatment in its system of accounts to these particular expenditures, what is the basis for requiring them to be charged to income and is this within the authority of the Commission?[25]

The answer given by the Commission to this question was as follows: "Furthermore, the classification of these expenditures below the line as income deductions is necessary and appropriate for purposes of administering the Act and is reasonable thereunder. The political expenditures of utilities fall into a peculiar category. By their nature, such expenditures obviously have a doubtful relationship to rendering utility service. Hence, the classification of such expenditures routinely to operating expenses would not be consistent with the objectives of utility accounting regulation, which aims at the separate disclosure and classification of all such controversial items, so as [to] enable a clear understanding and realistic appraisal of the nature thereof. Throwing all such controversial expenditures into a hotchpotch of operating expenses would tend to obscure their essential character, and make more difficult their informed analysis and proper ultimate disposition.

"Other considerations also justify the classification of political expenditures such as these to deductions from

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[24] Counsel at the oral argument stated: "The basis of the Commission's doing this was to put a flag on that expenditure, a cautionary signal, a yellow light, saying: Watch out; this kind of expenditure is within a controversial area. Anybody that looks at it—a securities analyst who looks at it, a consumer's representative who looks at it—says: here is something the Commission thinks needs a yellow light on it."

[25] The Commission's new Uniform System of Accounts, effective January 1, 1961, lists under "Operation and Maintenance Accounts" an Account No. 930 "Miscellaneous general expenses" of which one suggested item is "Institutional or goodwill advertising". Whether the advertising we here consider might have been so classified we have no occasion to consider here.

income rather than to operating expenses. The function of electric utilities and licensees under the Power Act is, in accordance with the requirements of the Act, to render public service in a business affected with a public interest; and it is fair and reasonable to require the customers to pay the expenses properly incurred by the companies in rendering this service. However, on matters which are politically controversial, differences of opinion may and frequently do exist between the companies and their customers, between management and the rate payer. The classification generally of political expenditures to operating accounts might seem to imply that such expenditures must in due course and without further question be paid by the rate payer. Such an implication would be unwarranted and possibly unfair, in view of the fact that on politically controversial matters, the opinions of management and the rate-payer may differ decidedly. Thus this accounting classification, while isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled without a further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises."

We must assume that even if we disagree with this decision of the Commission that these expenditures should be assigned to Account 538, that disagreement would not of itself warrant our setting aside the Commission's determination. "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 112.

Since the Commission was authorized as we have seen to deal with expenditures such as these, and to prescribe where they shall be classified under the Commission's system of accounts, it is plain that in stating that they should

be classified below the line as income deductions the Commission was taking action within its discretionary authority to determine what would be appropriate for purposes of administration of the act.[26]

We have noted the broad scope which §301 of the Act gives to the discretion and determination of the Commission. Under such circumstances the Supreme Court has said: "In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and application of the statute in a just and reasoned manner." *Gray* v. *Powell*, 314 U. S. 402, 411.[27]

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[26] The Supreme Court has held many times that one seeking review of an administrative order of this character may not come into court to "review action within the discretionary authority of the Commission". "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Rochester Tel. Corp. *v.* U. S., 307 U. S. 125, 133, 146. To upset the determinations expressed in the portions of the opinion of the Commission last quoted petitioners must demonstrate that there has been an abuse of discretion. "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' . . . as to be the expression of a whim rather than an exercise of judgment." A. T. & T. Co. *v.* United States, 299 U. S. 232, 236-237.

In Securities Comm'n *v.* Chenery Corp., supra, at p. 207, the Court said: "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of your concern."

[27] The Court said, "Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."

Manifestly the Commission might have chosen to give these expenditures a special category in a manner less drastic,—one that would "place a flag" on them, but still leave them "above the line", as costs of operation. It might have given them a classification similar to Account 926 in the 1961 Uniform System where "Institution or Goodwill advertising" is indicated to be classified "above the line". But the choice is solely that of the Commission. In *American Power Co.* v. *S. E. C., supra,* where the Commission had ordered dissolution of two holding companies, the Court noted the argument that dissolution could have been avoided as follows: "Emphasis is placed upon alternative plans which are less drastic in nature and which allegedly would meet the statutory standards." The Court answered this contention in the language we have quoted, *supra,* and cited *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194, to the same effect.[28]

We cannot disturb this determination of the Commission or hold its conclusions to be an abuse of discretion if there be a rational basis for its conclusions and warrant in the record for its judgment. It cannot be said that the Commission's conclusion here lacked a rational basis. Fourteen years previous to the making of this order the National Association of Railroad and Utilities Commissioners had concurred in the issuance of Interpretation E-110, previously described. That body was presumably composed of persons qualified to give a rational answer to the question there propounded. That fourteen years had elapsed since the date of that determination without its being cited is not significant here where it does not appear that the

[28] "Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

Commission had during that period been confronted with any such propaganda campaign as the one represented by these advertisements.

The Commission properly noted that these electric utilities and licensees were engaged in a business affected with a public interest; and that in respect to matters that are politically controversial there may be differences of opinion which exist between the companies and their customers.[29] The customer of a public utility has a special interest in what constitutes the rate base of the utility. It is not irrational to note that such a customer might well be strongly opposed to the arguments contained in these eight advertisements and might well feel much aggrieved if he is informed that his money is helping to pay for this publicity campaign.

Counsel for the Commission argues that the legislative history of the Act of August 26, 1935, discloses that the broad powers granted in §301 were designed for use in classifying expenditures such as these according to a "political-in-character" test. Petitioners take vehement exception to this reference to legislative history, calling it "Rationalization at its Worst, Evils of a Past Generation Resurrected." They say that in referring to reports of "massive propaganda activities of the private electric utility industry", which preceded enactment of this Act, Commission counsel have "disinterred" something more than 30 years old, and which was not listed in the Act as an evil; that reference to this "is obviously a device to pillory and demean the petitioning companies."

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[29] It seems reasonable to note that there is a substantial difference between the advertising expenditures of an ordinary industrial corporation, such as a manufacturing company, and those of a public utility. If the management of a manufacturing concern chooses to expend its funds in advocating certain views respecting matters of political controversy, the only persons in a position to make an objection are the stockholders who have a remedy through their voting rights. The customer of the manufacturing concern is not necessarily affected as the price he pays for the product is probably fixed by competition in the market place, certainly not by any public commission.

Appendix B.

The typical case in which legislative history is most useful is one where there is doubt or ambiguity in the terms of an Act. For reasons we have mentioned we think there is no doubt or ambiguity as to the meaning of §301; it plainly confers power to regulate and to establish a system of accounts,—a power which is as broad and all-inclusive as words can make it. We have not been able to find, in any report on the particular bill which became this enactment, or in any remark in Congress by the managers of the bill, saying, in so many words, that §301 was designed to allow the Commission to "put a flag" on expenditures such as these, or to see to it that they were not charged to operating expenses.[30]

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[30] The bill, and the Act as passed, had provisions relating to four different aspects of the utility business. Title I of the Act dealt with public utility holding companies. (Its provisions are now found in Title 15 U. S. C. §§79 to 79z.) Title II contained three parts: First, were sundry amendments to the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and provision making the 1920 Act, as amended, Part I of the "Federal Power Act"; second, Part II was added, headed "Regulation of Electric Utility Companies Engaged in Interstate Commerce"; and finally, Part III was included, headed "Licenses and Public Utilities; Procedural and Administrative Provisions". §301 is the first section in this Part III.

§1(b) of the Act recites certain sources of facts on the basis of which the legislation is enacted. It lists, among others, a report of the Federal Trade Commission. This report, 101 volumes in length, entitled "Summary Report of Federal Trade Commission to the Senate of the United States Pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., On Holding and Operation Companies of Electric and Gas Utilities" contains some lengthy discussions of such companies' methods of accounting, of their efforts to influence public opinion, and their publicity and propaganda activities.

In Part 73(a) of Document No. 92, in chapter XIV, which is headed: "Conclusions and Recommendations" reference is made to some 19 so-called "evil conditions and practices". No. 13 is "Deceptive or unsound methods of accounting for assets and liabilities, costs, operating results and earnings, including writeups unrealized fictitious profits, stock dividends," etc. Part 71(a) relates to "Efforts by associations and agencies of electric and gas utilities to influence public opinion." This entire volume is devoted to a

Appendix B.

It is possible that the powers to regulate public utility accounts granted in §301 were designed to control these practices mentioned in the Federal Trade Commission document. But nothing we can find in the legislative history makes any express statement to that effect. §1 of the Act, (now found in Title 15 U.S.C. §79(a)) enumerated certain abuses which were proposed to be eliminated. All of these related to the practices of public utility holding companies and their subsidiaries. The fierce and acrimonious debates which preceded passage of the bill related almost exclusively to the holding company aspects of the legislation. We think the legislative history does not have the impact counsel for the Commission attach to it.

However, the Federal Trade Commission report is not without other significance here. For we are considering whether the decision of the Commission that these expenditures should be reclassified in Account No. 538 is a reasonable one—whether it has a rational basis. And relevant to that inquiry is the fact, if it be a fact, that many students of such questions have been of the opinion that arguments by the utilities against public power, or the government's public power program, ought not to be paid for as operating expenses and that such expenditures ought not to figure in rate-making or be charged to consumers. The Report of the

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discussion of this subject including such items as the following: "In emphasizing that the work was worthwhile, M. A. Aylesworth, then the director of the National Electric Light Association, advised utility executives not to be afraid of the expense in permitting large numbers of their employees to attend conventions because 'the public pays'. This is literally true as the cost of all the public relations work is usually charged up as operating expenses by the utility companies."

Part 81(a) of this report is entirely devoted to its stated subject of "Publicity and Propaganda Activities by Utilities Corporations and Companies". Pages 141 to 146 of that volume contain a discussion of "political activities in the State of Washington." This was a description of the expenditures by electric utility companies in that State to defeat certain legislation; also a description of activities by the utilities generally in state and local matters such as propaganda against municipal ownership and efforts to forestall and defeat regulation.

Federal Trade Commission reflects that view. We cannot say that the Congressional majorities who passed the bill that became this Act, after one of the most intense and heated legislative battles in American history,[31] would have considered that view untenable.[32]

In its opinion the Commission referred to these expenditures thus ordered reclassified under Account 538, as "political expenditures, including expenditures for political advertisement". The Commission spoke of the "essential political character" of the advertisements, stating that they related to matters which are "politically controversial". Petitioners say: "The would-be test 'political in character' is too indefinite and uncertain to constitute a valid basis of classification". They go on to say that these terms are too vague, indefinite and uncertain to provide meaningful criteria on which either legislation or a rule or regulation may be predicated. We think that no problem is presented by the facts of this case; there is no situation here calling for an answer to a question as to whether a precise guide or certain standard for conduct has been furnished.

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[31] For an account of this see Schlesinger, "The Age of Roosevelt, The Politics of Upheaval", Chapter 17, "The Utilities on the Barricades", pp. 302-324.

[32] In 1935, during the period when this legislation was under consideration, a special Senate Committee headed by Senator Black investigated the lobbying activities carried on while the bill was under consideration. "Investigation of Lobbying Activities, Hearings, U. S. Senate, 74th Cong., 1st Sess. 1935." In a radio address which was printed in the Congressional Record, (August 9, 1935, Vol. 79, Part 12, pp. 12770-12772), Senator Black gave a summary of the testimony before the Committee in which he asserted that "the power lobby in this matter will be known as the $5,000,000 lobby." He spoke of "a flood of telegrams and a deluge of letters" and said: "Most of the expenses have come from the individual companies themselves, and have been charged up to operating expenses of the various local power company units. You who listen to me can rest assured that a part of the expenses of the campaign against this bill has most likely been charged to the operating expenses of the company supplying the electricity for the light in your room at this very moment. In other words, you will pay the bill."

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The Commission was not laying down any general rule for future action in all cases. All that this order did was to direct a specific reclassification of expenditures for eight definitely identified advertisements. Since the order adequately identified that to which it was directed, it would appear to be wholly immaterial what appellation is given to these advertisements, whether they be called "political" or referred to by some other name. It appears to us that the description "political in character" is about as useful a shorthand description of these advertisements as could be desired. The advertisements show on their face that they are all similar in the message which they purport to convey. The Commission described them adequately, we think, as follows: "Viewed generally, it is clear from their face that, with the exeception of the first advertisement, they deal with a political controversy, the private-public power dispute, and hence involve the presentation of argument in matters of political controversy. Considered more particularly, a scrutiny of the advertisements and a reading of their texts discloses that they have as a basic ultimate purpose the influencing of public opinion as to the repeal of existing law."[33]

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[33] "These facts appear from the advertisements themselves, and no other evidence is necessary to confirm them. Thus the message conveyed by most of the advertisements in Appendix A is that federally supported electric systems and power dams are relieved of tax burdens which taxpayers generally must pay, resulting in favoritism to consumers who get electricity from such installations at cheaper rates, and in unfair discrimination against taxpaying utilities and taxpayers generally who do not receive such tax concessions. This idea is also conveyed by the captions and illustrations of the advertisements. The text of six of the advertisements—Nos. 2, 3, 4, 5, 6 and 7—call specific attention to present tax laws as the cause of this condition. The other two speak of 'tax favoritism' and 'trick' taxes. The text of several of the advertisements, including Nos. 4, 5, 6 and 7, includes the suggestion that 'something ought to be done' about this tax favoritism or that it should be 'given critical study.' Although more obvious in the case of some than others, we think it is reasonably apparent that advertisements Nos. 2 through 9 are aimed at influencing public opinion to secure legislation to correct these claimed tax inequities. Thus all of the ques-

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It seems plain to us that it was within the competence of the Commission to give these particular advertisements a special classification and to deal with them whether by the use of the word "political" or some other term, as items which should be placed in a special category. The Commission had the right, we think, to view these advertisements as a calculated effort to revive the old battle against public power, and to sell these ideas to the public. Its determination that expenditures for such a campaign should be separately classified as "Miscellaneous Income Deductions" for accounting purposes is something we are not permitted to reverse.

Some of the witnesses whose testimony was offered undertook to testify that in their opinion these advertisements were not political in character, giving their definitions of "political".[34] The Commissions's opinion shows that it considered this evidence but that it deemed the matter "of

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tioned advertisements, with the exception of No. 1, are political in character, and under our System of Accounts the costs thereof should be classified to an income deductions account, specifically Account 538."

[34] Thus Dr. Wm. A. Patou, a professor of economics and of accounting and author of books on accounting and accounting theory, in a sworn statement which was offered in proof before the examiner, gave his opinion that Interpretation E-110 would not require that the expenditures here in question be charged to Account 538. It was his view that the words "having any direct or indirect relation to political matters" contained in the text of that interpretation would not operate to suggest a charge of the expenditures here involved below the line. It was his view that those advertisements were non-political in character.

Dr. R. G. Guthmann, a professor of finance, a certified public accountant, a former national president of the National Finance Association, and an author of books on finance and financial policy, in like manner was offered as a witness to testify according to his prepared testimony that the questioned ECAP advertisements were non-political in character because they had been published for the purpose of meeting the competition of governmental agencies in the power field. "It is unreasonable to put the 'political' label on an activity that is a regular part of business competition merely because the ideas communicated may have incidental legislative, tax or similar consequences."

insufficient weight to establish that the advertisements are in fact nonpolitical in character."

These expressed opinions of the proffered witnesses were no more effective in negativing the administrative conclusion than were the opinions of the Court of Appeals which disagreed with administrative decisions as to the meaning of the words "producer", *Gray* v. *Powell, supra,* and "employees", *Board* v. *Hearst Publications,* 322 U. S. 111. As suggested above, in essence the Commission's decision here may be stated without any reference to the word "political". Without applying any descriptive phrase to these questioned advertisements, what the Commission has done is to say that the expenditures for these particuler eight advertisements must be reclassified to Account 538.

The Commission did not question but that the proffered evidence would show that the advertising served other purposes such as meeting competition, protecting the companies' markets, and explaining the reasons for their rates to the companies' customers. But the decision of the Commission was obviously that whether these advertisements did or did not serve some additional purposes, they nevertheless showed on the face of the advertisements themselves that while the text differed in phraseology, they were uniform in denunciation of unfair discrimination against taxpaying utilities and taxpayers generally; complaining of "favoritism", and "trick", and generally concluding with the suggestion that "something ought to be done" about this "unfair tax favoritism."[35]

Since this administrative determination was within the discretion of the Commission, it seems plain that reversible error cannot be predicated upon its exclusion of testimony

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[35] The Commission's opinion states: "Assuming arguendo that respondents' proffered evidence shows that the expenditures have some other additional or subsidiary aspect or purpose—that, for example, they were necessary to meet governmental competition, to protect the companies' markets, and to preserve their financial well-being—this would not detract from their fundamentally political character, nor would it justify classifying them under our System of Accounts other than in the manner we find to be appropriate for political expenditures."

which under its determination would be irrelevant and immaterial.

Finally, the petitioners assert that the Commission's action "limits and penalizes speech which the Constitution makes free in violation of the First Amendment and deprives the companies of property rights without due process of law in violation of the Fifth Amendment." We are unable to find here any basis for an argument of this character. As we have noted, nothing in the order prohibits or restrains the petitioners from publishing or republishing these or any other similar advertisements. Their freedom of speech or freedom of action in this area are not in any manner limited. All that has occurred in this proceeding relating to keeping of accounts is to exercise the Commission's discretion as to where these expenditures should be entered and to do so in such manner as to indicate the views of the Commission that such expenditures should not be subsidized by the consumers who purchase the power; that those expenditures should be charged to an income account.

In our opinion the order here involved did not impinge upon any constitutional rights of the petitioner any more than did the Internal Revenue regulation applied in *Cammarano* v. *United States*, 358 U. S. 498, 513. In that case, the Court said: "Petitioners are not being denied a tax deduction because they engaged in constitutionally protected activities but are simply being required to pay for those activities entirely out of their own pockets, as every one else engaged in similar activities is required to do under the Internal Revenue Code."

Here it may be said that these petitioners are not being denied the right to charge the cost of this advertising as operating expenses because they engage in constitutionally protected activities; they are simply being required to keep their books in such manner as to indicate that presumptively those activities are to be paid for out of their own pockets rather than passed on to the consumer.

The order of the Commission is

AFFIRMED.

APPENDIX C.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

EDWARD W. WADSWORTH
Clerk

Post Office Box 23
New Orleans 6, La.

Office of the Clerk
June 29, 1962

TO ALL COUNSEL ON ATTACHED PAGES

Re: No. 18667—*Southwestern Electric Power Company* vs. *F. P. C.*

No. 18669—*Alabama Power Company, et al.* vs. *F. P. C.*

No. 18672—*Arizona Public Service Co. et al.* vs. *F. P. C.*

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petitions for Rehearing in the above cases. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ CLARA R. JAMES
Chief Deputy Clerk

APPENDIX D.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

OCTOBER TERM, 1961.

No. 18669

ALABAMA POWER COMPANY, *et al*,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition for Review of Orders of the Federal Power Commission.

Before TUTTLE, Chief Judge, and POPE and GEWIN, Circuit Judges.

This cause came on to be heard on the petition of Alabama Power Company, *et al*, for review of orders of the Federal Power Commission issued on August 17, 1960 and October 11, 1960 in Docket No. E-6836, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

May 16, 1962

Issued: July 12, 1962.

Appendix D.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

OCTOBER TERM, 1961.

No. 18672

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition for Review of Orders of the Federal Power Commission.

Before TUTTLE, Chief Judge, and POPE and GEWIN, Circuit Judges.

This cause came on to be heard on the petition of Arizona Public Service Company, *et al*, for review of orders of the Federal Power Commission issued on August 17, 1960 and October 11, 1960 in Docket No. E-6836, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the orders of the Commission in this cause be, and the same are hereby, affirmed.

May 16, 1962

Issued: July 12, 1962.

APPENDIX E.

Order Questioning Accounting Entries; Providing for Hearing; and Directing Holding of Prehearing Conference.

(Issued August 1, 1958)

The question herein before the Commission relates to the propriety, under the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licenses of the accounting treatment accorded by the above named Companies with respect to certain expenditures which each Company incurred during the calendar year 1957 as a participant in the "Electric Companies Advertising Program"[1] under the sponsorship of "America's Independent Electric Light and Power Companies."

The specific accounting entries herein questioned are as shown by individual Companies in Columns (1), (2), and (3) of the attached Table A. They are questioned insofar as they include the dollar amounts shown in Column (5) of that Table. Available data indicate that the amounts in Column (5) represent the proportionate cost to each of the Companies for certain of the copy placed in numerous national publications under the 1957 E. C. A. P. Program.

The particular copy referred to is captioned as follows:

> POWER COMPANIES BUILD FOR YOUR NEW ELECTRIC LIVING
>
> are you aware of this strange use of your tax money?
>
> Where *do* your taxes go?
>
> Why do customers of *this* power dam have to help pay electric bills for customers of *this* one?
>
> *This* trick's on *you!*

[1] That program is hereinafter referred to as the "1957 E. C. A. P. Program".

Appendix E.

The Case of the Missing Millions

Would you call *this* fair play? [hurdlers]

Can *you* answer these questions about taxes?

Would you call this fair play?[2] [basketball players]

The reported total cost of the above-listed copy is $863,130.15 or 43.25% of the reported cost of all copy placed under the 1957 E. C. A. P. Program totalling $1,995,661.14. The total amount contributed by each of the Table A-named Companies to the 1957 E. C. A. P. Program appear in Column (4) of the attached Table A. In the aggregate, those amounts total $1,286,083.15. To ascertain the proportion of each Company's contribution attributable to the cost of the above-listed copy, the staff applied the aforementioned percentage of 43.25 to the individual contribution of each Company. The resulting amounts are as shown in Column (5) of the attached Table A.

In accounting for their respective contributions totalling $1,286,083.15, 53 of the Table A-owned Companies charged an aggregate of $731,070.72 to F. P. C. Account No. 787, Demonstration, Advertising and Other Sales Expenses and 29 charged an aggregate of $555,012.43 to Account No. 801, Miscellaneous General Expenses. With the exception of three of the Table A-named Companies which split their respective charges between the above operating expense accounts, each Company reported its accounting for this transaction involved the use of only one of these accounts.

The Commission staff proposes that these charges be reclassified, in part, for the reason that the expenditures involved are, in part, of a type and character not within the scope of Account Nos. 787 and 801. The instructions set forth in the Uniform System of Accounts regarding the use of those accounts are as follows:

[2] Reproductions of this copy appear in the attached Table B marked as to the places of publication and the dates of publication.

Appendix E.

(1) 787. Demonstration, Advertising, and Other Sales Expenses.

A 787.1 Demonstration.

This account shall include the cost of labor and materials used and expenses incurred in demonstrating the use of appliances or other equipment.

Note.—Do not include in this account demonstration expense incurred in connection with merchandise or appliance sales.

ITEMS

1. Employees:
   (a) Demonstrators.
   (b) Instructors.
   (c) Typists and Clerks.
2. Expenses:
   (a) Building service (not including rent).
   (b) Communication service.
   (c) Demonstration supplies.
   (d) Electric service.
   (e) Transportation.

A 787.2 Advertising.

This account shall include the cost of labor and materials used and expenses incurred in connection with advertising for the purpose of promoting the sales of electricity.

Note.—Do not include in this account advertising in connection with merchandise or appliance sales.

Appendix E.

ITEMS

1. Advertising in newspapers, periodicals, etc.

2. Advertising manager and assistants.

3. Clerks.

4. Materials and expenses in preparing:

   (a) Advertisements.

   (b) Booklets.

   (c) Bulletins.

   (d) Dodgers.

   (e) Posters.

5. Stenographers and typists.

A 787.3 Miscellaneous Sales Expenses.

This account shall include the cost of labor and materials used and expenses incurred in soliciting new business, except amounts chargeable to the foregoing accounts.
Note.—Do not include in this account expenses incurred in connection with merchandise or appliance sales.

(2) 801. Miscellaneous General Expenses.

This account shall include such items of expense applicable to the electric department as the cost of publishing and distributing annual reports to stockholders; advertising notice of stockholders' meetings; dividend and other corporate and financial notices of a general character; association dues; contributions for conventions and meetings of the industry; cost of research and experimental work conducted for the benefit of the electric department or the industry or for the improvement of electric service

(except such amounts as may be properly chargeable to other accounts); fees of transfer agents, registrars of stock, and fiscal agents; director's fees; and any other miscellaneous expenses connected with the general management and not otherwise provided for.

The staff recommends the reclassification of the amounts shown in Column (5) of the attached Table A to Account No. 538, Miscellaneous Income Deductions, for the reason that the expenditures involved relate to the matter of private versus public ownership of electric facilities, a subject of political controversy, and the above-listed copy is of an argumentative character or nature in that controversy. The instructions set forth in the Uniform System of Accounts regarding the use of Account 538 are as follows:

538. Miscellaneous Income Deductions

This account shall include miscellaneous debits to income, not provided for elsewhere.

ITEMS

1. Decline in value of investments. (See Balance sheet instruction 4.)

2. Donations.

3. Expenditures for associated companies for which the utility will not be reimbursed.

By separate letters of the Commission dated February 27, 1958, each of the above Companies was advised that in the opinion of this Commission expenditures involving the presentation of argument in matters of political controversy are not properly includible in any of the 700 or 800

Appendix E.

Series of Accounts of the Commission's Uniform System of Accounts but rather should be classified in Account No. 538.

Available data indicate that each above-entitled Company is a licensee and/or public utility under the Federal Power Act and therefore subject, as such, to the requirements of the Commission's Uniform System of Accounts: The respective principal places of business of the above-entitled Companies and the States in which those Companies operate are as follows:

Name of Company	Operating in State/s	Principal Place of Business
Alabama Power Company	Alabama	Birmingham, Alabama
Arizona Public Service Company	Arizona	Phoenix, Arizona
Arkansas Missouri Power Company	Arkansas, Missouri	Blytheville, Arkansas
Arkansas Power & Light Company	Arkansas	Pine Bluff, Arkansas
Blackstone Valley Gas & Electric Company	Rhode Island	Pawtucket, Rhode Island
Boston Edison Company	Massachusetts	Boston, Massachusetts
Carolina Power & Light Company	North Carolina, South Carolina	Raleigh, North Carolina
Central Hudson Gas & Electric Corporation	New York	Poughkeepsie, New York
Central Illinois Public Service Company	Illinois	Springfield, Illinois
Central Louisiana Electric Company, Inc.	Louisiana	Lafayette, Louisiana
Delaware Power & Light Company	Delaware	Wilmington, Delaware
Duquesne Light Company	Pennsylvania	Pittsburgh, Pennsylvania
El Paso Electric Company	New Mexico, Texas	El Paso, Texas
Empire District Electric Company	Kansas, Missouri, Arkansas, Oklahoma	Joplin, Missouri
Fitchburg Gas & Electric Light Company	Massachusetts	Fitchburg, Massachusetts

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Name of Company	Operating in State/s	Principal Place of Business
Georgia Power Company	Georgia	Atlanta, Georgia
Gulf Power Company	Florida	Pensacola, Florida
Gulf States Utilities Company	Louisiana, Texas	Beaumont, Texas
Hartford Electric Light Company, The	Connecticut	Hartford, Connecticut
Holyoke Water Power Company	Massachusetts	Holyoke, Massachusetts
Idaho Power Company	Idaho, Nevada, Oregon	Boise, Idaho
Interstate Power Company	Illinois, Iowa, Minnesota, South Dakota	Dubuque, Iowa
Iowa Public Service Company	Iowa, South Dakota, Nebraska	Sioux City, Iowa
Jersey Central Power & Light Company	New Jersey	Asbury Park, New Jersey
Kansas Gas & Electric Company	Kansas	Wichita, Kansas
Lake Superior District Power Company	Michigan, Wisconsin	Ashland, Wisconsin
Louisiana Power & Light Company	Louisiana	New Orleans, Louisiana
Marietta Electric Company, The	Ohio	Fairmont, West Virginia
Merrimack-Essex Electric Company	Massachusetts	Salem, Massachusetts
Metropolitan Edison Company	Pennsylvania	Muhlenberg Township, Berks County, Pa.
Minnesota Power & Light Company	Minnesota	Duluth, Minnesota
Mississippi Power Company	Mississippi	Gulfport, Mississippi
Mississippi Power & Light Company	Mississippi	Jackson, Mississippi
Mississippi Valley Public Service Company	Minnesota, Wisconsin	Winona, Minnesota
Missouri Edison Company	Missouri	Louisiana, Missouri
Missouri Power & Light Company	Missouri	Jefferson City, Missouri.
Monongahela Power Company	West Virginia	Fairmont, West Virginia
Montana Power Company, The	Montana, Idaho	Butte, Montana
Monterey Utilities Corporation	Virginia	Fairmont, West Virginia

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Name of Company	Operating in State/s	Principal Place of Business
Narragansett Electric Company, The	Rhode Island	Providence, Rhode Island
New Jersey Power & Light Company	New Jersey	Denville, New Jersey
New Orleans Public Service, Inc.	Louisiana	New Orleans, Louisiana
New York State Electric & Gas Corporation	New York	Ithaca, New York
Northern States Power Company of Minnesota	Minnesota, North Dakota, South Dakota	Minneapolis, Minnesota
Northern States Power Company of Wisconsin	Wisconsin, Minnesota	Eau Claire, Wisconsin
Northern Virginia Power Company	Virginia	Winchester, Virginia
Ohio Edison Company	Ohio	Akron, Ohio
Oklahoma Gas & Electric Company	Oklahoma, Arkansas	Oklahoma City, Oklahoma
Orange and Rockland Utilities, Inc.	New York	Nyack, New York
Pacific Gas & Electric Company	California	San Francisco, California
Pacific Power & Light Company	Oregon, Washington, Idaho, Montana, Wyoming	Portland, Oregon
Pennsylvania Electric Company	Pennsylvania, New York	Johnstown, Pennsylvania
Pennsylvania Power Company	Pennsylvania	New Castle, Pennsylvania
Pennsylvania Power & Light Company	Pennsylvania	Allentown, Pennsylvania
Philadelphia Electric Company	Pennsylvania	Philadelphia, Pennsylvania
Potomac Edison Company, The	Maryland	Frederick, Maryland
Potomac Electric Power Company	District of Columbia, Maryland, Virginia	Washington, D. C.
Potomac Light & Power Company	West Virginia	Martinsburg, West Virginia
Public Service Company of Indiana, Inc.	Indiana	Plainfield, Indiana
Puget Sound Power & Light Company	Washington	Seattle, Washington

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Name of Company	Operating in State/s	Principal Place of Business
Rockland Electric Company	New Jersey	Nyack, New York
South Carolina Electric & Gas Company	South Carolina	Columbia, South Carolina
South Penn Power Company	Pennsylvania	Waynesboro, Pennsylvania
Southwestern Gas & Electric Company	Louisiana, Texas, Arkansas, Okla.	Shreveport, Louisiana
Southwestern Public Service Company	Texas, Oklahoma, New Mexico, Kansas	Dallas, Texas
Suburban Electric Company	Massachusetts	Malden, Massachusetts
Superior Water, Light and Power Company	Wisconsin	Superior, Wisconsin
Union Electric Company	Missouri, Illinois, Iowa	St. Louis, Missouri
Utah Power & Light Company	Utah, Idaho, Wyoming	Salt Lake City, Utah
Virginia Electric & Power Company.	Virginia, North Carolina, West Virginia	Richmond, Virginia
Washington Water Power Company, The	Washington, Idaho, Montana	Spokane, Washington
West Maryland Power Company, The	Maryland	Fairmont, West Virginia
West Penn Power Company	Pennsylvania	Greensburg, Pennsylvania
West Texas Utilities Company	Texas	Abilene, Texas
Western Massachusetts Electric Company	Massachusetts	Greenfield, Massachusetts
Worcester County Electric Company	Massachusetts	Worcester, Massachusetts

In view of the foregoing it appears that the accounting treatment accorded by each of the Table A-named Companies with respect to the dollar amounts shown in Column (5) of the attached Table A may, in each instance, involve a violation of the Commission's Uniform System of Accounts and each of the accounting entries there involved should be questioned. Accordingly, it appears necessary and appropriate for the purposes of the Federal Power

Act (particularly Sections 3, 4, 301, 302, 304, 307, 308 and 309), and the Uniform System of Accounts and Regulations prescribed thereunder, that those entries be questioned and that a hearing be held with respect thereto all as hereinafter provided.

The Commission orders:

(A) The accounting entry or entries of each of the Table A-named Companies shown in Columns (2) and (3) of the attached Table A are hereby questioned to the extent of the inclusion therein of the dollar amounts shown in Column (5) of that Table.

(B) A public hearing be held in the Commission's Hearing Rooms, 441 "G" Street, N.W., Washington 25, D. C., commencing at 10:00 a.m. EDST, October 7, 1958, with respect to the compliance of the accounting entries questioned in Paragraph (A) above, with the requirements of the Commission's Uniform System of Accounts.

(C) A prehearing conference, pursuant to the provisions of Section 1.18 of the Commission's Rules of Practice and Procedure (18 CFR 1.18) be held in this case at the Commission's offices, 441 "G" Street, N.W., Washington 25, D. C., commencing at 10:00 a.m., EDST, September 9, 1958; such conference to be presided over by the presiding examiner assigned to this case.

(D) At the hearing ordered herein each of the above-entitled Companies shall present any justification there may be for its (or indicated predecessor), respective accounting entry or entries herein questioned; and shall show cause, if any there be, why it should not, by an appropriate memorandum accounting entry reclassify to Account 538, the respective dollar amount shown in Column (5) of the attached Table A opposite its (or indicated predecessor) corporate name.

Appendix E.

(E) Interested State Commissions may participate in this proceeding as provided in Sections 1.8 and 1.37(f) of the Commission's Rules of Practice and Procedure [18 CFR 1.8 and 1.37 (f)].

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

[Table A consists of a tabulation which is substantially identical to the one reproduced herein as Appendix B to Opinion No. 337 (Exhibit to this Petition); Table B consists of copies of the questioned ECAP advertisements which are identical to Appendix A to Opinion No. 337 also reproduced herein.]

APPENDIX F.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; FREDERICK STUECK, ARTHUR KLINE AND PAUL A. SWEENEY.

Docket No. E-6836

Alabama Power Company
Arizona Public Service Company
Arkansas Missouri Power Company
Arkansas Power & Light Company
Blackstone Valley Gas & Electric Company
Boston Edison Company
Carolina Power & Light Company
Central Hudson Gas & Electric Corporation
Central Illinois Public Service Company
Central Louisiana Electric Company, Inc.
Delaware Power & Light Company
Duquesne Light Company
El Paso Electric Company
Empire District Electric Company
Fitchburg Gas & Electric Light Company
Georgia Power Company
Gulf Power Company
Gulf States Utilities Company
Hartford Electric Light Company, The
Holyoke Water Power Company
Idaho Power Company
Interstate Power Company
Iowa Public Service Company
Jersey Central Power & Light Company
Kansas Gas & Electric Company
Lake Superior District Power Company
Louisiana Power & Light Company
Marietta Electric Company, The
Merrimack-Essex Electric Company

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Metropolitan Edison Company
Minnesota Power & Light Company
Mississippi Power Company
Mississippi Power & Light Company
Mississippi Valley Public Service Company
Missouri Edison Company
Missouri Power & Light Company
Monongahela Power Company
Montana Power Company, The
Monterey Utilities Corporation
Narragansett Electric Company, The
New Jersey Power & Light Company
New Orleans Public Service, Inc.
New York State Electric & Gas Corporation
Northern States Power Company of Minnesota
Northern States Power Company of Wisconsin
Northern Virginia Power Company
Ohio Edison Company
Oklahoma Gas & Electric Company
Orange and Rockland Utilities, Inc.
Pacific Gas and Electric Company
Pacific Power & Light Company
Pennsylvania Electric Company
Pennsylvania Power Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Edison Company, The
Potomac Electric Power Company
Potomac Light & Power Company
Public Service Company of Indiana, Inc.
Puget Sound Power & Light Company
Rockland Electric Company
South Carolina Electric & Gas Company
South Penn Power Company
Southwestern Electric Power Company
Southwestern Public Service Company
Suburban Electric Company

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Superior Water, Light and Power Company
Union Electric Company
Utah Power & Light Company
Virginia Electric & Power Company
Washington Water Power Company, The
West Maryland Power Company, The
West Penn Power Company
West Texas Utilities Company
Western Massachusetts Electric Company
Worcester County Electric Company

Opinion No. 337.

Opinion and Order Requiring Reclassification of Expenditures Under the Commission's Uniform System of Accounts

(Issued August 17, 1960)

These proceedings, which arose under a show cause order issued by the Commission on August 1, 1958, questioning the accounting treatment of certain expenditures of the seventy-six electric power companies which are the respondents in this case, are before us pursuant to our order issued December 15, 1959, providing for the omission of the intermediate decision procedure. The basic question presented is whether the respondents have classified certain advertising expenditures which they incurred to the proper Account under the Commission's "Uniform System of Accounts Prescribed for Public Utilities and Licensees Under the Federal Power Act." The respondents have charged the expenditures to operating expense accounts, and the Commission's staff, questioning this accounting classification, contends that they should be charged to a miscellaneous income deductions account. We conclude, for the reasons hereinafter stated, that most of the expenditures in

question were erroneously classified and must be reclassified by the respondents to a miscellaneous income deductions account, in accordance with the findings and conclusions of this Opinion and order.

The respondents incurred the questioned expenditures during the calendar year 1957 as participants in the "Electric Companies Advertising Program," hereinafter called the ECAP program. This program was sponsored by what are called in the advertisements "America's independent electric light and power companies." In keeping their accounts, the respondents charged these expenditures to Account 787, "Demonstration, Advertising, and Other Sales Expenses," and Account 801, "Miscellaneous General Expenses." The Commission's staff has questioned the propriety of this classification for nine of the twenty-six advertisements involved in the 1957 ECAP program, taking the position that they should be charged to Account 538, "Miscellaneous Income Deductions."[1]

By letter dated February 27, 1958, we advised the companies that these expenditures appeared to involve "the presentation of argument in matters of political controversy" and therefore were not properly includible in any of the 700 and 800 series of Accounts. To this series of accounts are classified operating expenses normally charged against electric revenues collected from the rate payer; in the language of accountancy, such items are classified "above the line." Instead, the companies were advised, the expenditures should be classified to Account 538, involving income deductions which are normally charged against general corporate income. Such items, which thus have a more direct impact on the shareholder, are classified "below the line."

The total reported cost of the nine advertisements questioned by staff is $863,130.15, or 43.25 percent of the total

[1] The nine questioned advertisements are reproduced in Appendix A hereto.

of $1,995,661.14 expended for the 1957 ECAP program. The respondents herein contributed $1,286,083.15 of the 1957 program total, in accounting for which fifty-three of the respondents charged an aggregate of $731,070.72 to Account 787, Demonstration, Advertising, and Other Sales Expenses, and twenty-nine charged an aggregate of $555,012.43 to Account 801, Miscellaneous General Expenses. With the exception of three of the companies which split their respective charges between the above operating expense accounts, each company reporting its accounting of these expenditures used only one of those accounts. None of the respondents herein used Account 538, Miscellaneous Income Deductions, for any part of these expenses, although six companies not made parties to these proceedings charged $132,491.36 to Account 538.[2]

By Commission order issued August 1, 1958, 20 F. P. C. 188, we provided for a hearing as authorized by Section 301 (a) of the Power Act,[3] to determine the correctness of the respondents' accounting treatment of these expenditures. At the hearing, which commenced on January 9, 1959, counsel appearing generally for the majority of the respondents sought to adduce evidence consisting principally of testimony by accountants, business executives, and others alleged to be expert on the matters in issue. In summary, this evidence was intended to show that the questioned advertising expenditures were necessary to counter the competition of government owned and subsidized electric power facilities and to protect respondents' businesses

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[2] The names of the respondents and the details of their expenditures and the accounting treatment they have accorded them are shown in Appendix B hereto.

[3] Section 301(a) in part pertinent provides:

> The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry. . . .

from such competition; that therefore such expenditures were ordinary, necessary, and just and reasonable expenses in the operation of the respondents' businesses; and that accordingly, within the meaning and intent of our System of Accounts, they should be classified to either or both Accounts 787 and 801, as proper operating expenses.

The presiding examiner ruled that this and other evidence of similar character was inadmissible in evidence. Counsel for the respondents appealed the examiner's ruling to the Commission, and by Opinion No. 323 and accompanying order issued herein on July 15, 1959, 22 F. P. C. 72, we affirmed the examiner's ruling. In Opinion No. 323, we held in essence that under our past interpretation of the System of Accounts, political expenditures had been required to be classified to Account 538, Miscellaneous Income Deductions, and that only evidence relevant and material to the issue of whether respondents' questioned advertising expenditures were political should be admitted in evidence. Looking at the advertisements themselves, we found that the expenditures for eight of the nine questioned advertisements were political in character, as we had previously interpreted that term. And we held that the evidence proffered by respondents was "without probative value" to show the contrary, since such evidence was not relevant to the issue of whether the advertisements were political, but was directed to other subsidiary issues, such as whether the advertisements were ordinary and necessary operating expenses. We further held that assuming the relevancy of this proffered evidence, it was lacking in sufficient weight to prove that the advertisements were in fact non-political.

Opinion No. 323 also directed that the hearing before the examiner be resumed to afford respondents opportunity to adduce any further evidence they deemed admissible. The hearing was resumed on November 23, 1959, and concluded on November 24, 1959. Most of the evidence offered by respondents at the resumed hearing was objected to by staff

counsel as inadmissible under Opinion No. 323, and it too was excluded by the presiding examiner. However, the proffered evidence is in the record before us in the form of an offer of proof. Pursuant to our order omitting the intermediate decision procedure referred to above, the case is now before us for decision.

The Commission's Determinations

As authorized by the Federal Power Act, the Commission's Uniform System of Accounts for Public Utilities and Licensees was prescribed in 1936, effective January 1, 1937. It has been revised, amended, and interpreted on numerous occasions since then. Relatively early in the history of the System of Accounts, the Commission interpreted it to require that political expenditures be charged to an income deductions account. This interpretation of the System of Accounts as applied to political advertisements finds detailed expression in Accounting Interpretation E-110, issued November 27, 1945, the provisions of which are set forth in the footnote below.[4] This interpretation provides, in effect, that the cost of advertisements that are reasonably to be characterized as political in character should

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[4] Accounting Interpretation E-110 in question and answer form provides as follows:

Question: What is the proper account to be charged with non-promotional advertising of the type sometimes referred to as institutional advertising or as goodwill advertising, the purpose of which is to foster and maintain public goodwill rather than for any immediate and direct promotion of sales of electricity or appliances?

Answer: Such advertising should be charged to Account 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, approval or revocation of franchises; for the purpose of influencing decisions of public officers; or having any direct or indirect relationship to political matters.

be classified to Account 538, Miscellaneous Income Deductions, in contrast to expenditures for other types of advertisements which are charged to operating expense accounts. Among the instances of political advertisements given in this interpretation are advertisements for the purpose of influencing public opinion as to the election of public officers, proposed legislation, repeal of existing laws, and influencing decisions of public officers. The question before us here is whether the respondents' questioned advertising expenditures are political in character so as to require their classification to Account 538.

We conclude that the questioned advertising expenditures are political in character and should be classified to Account 538. The advertisements themselves, which are in the record before us, afford the best and most conclusive evidence of their essential character. Viewed generally, it is clear from their face that, with the exception of the first advertisement,[5] they deal with a political controversy, the private-public power dispute, and hence involve the presentation of argument in matters of political controversy. Considered more particularly, a scrutiny of the advertisements and a reading of their texts discloses that they have as a basic ultimate purpose the influencing of public opinion as to the repeal of existing law. Thus they have not just an indirect relationship to political matters, but are directly political. In addition, it is a fair inference that their ultimate purposes include the influencing of public opinion as to such matters as the election of public officers, proposed legislation, and influencing the decisions of public officers. And their purposes may also include the influencing of public opinion as to proposed ordinances, repeal of existing ordinances, and the approval or revocation of franchises.

These facts appear from the advertisements themselves, and no other evidence is necessary to confirm them. Thus the message conveyed by most of the advertisements in

[5] Advertisement No. 1 in Appendix A hereto.

Appendix F.

Appendix A is that federally supported electric systems and power dams are relieved of tax burdens which taxpayers generally must pay, resulting in favoritism to consumers who get electricity from such installations at cheaper rates, and in unfair discrimination against taxpaying utilities and taxpayers generally who do not receive such tax concessions. This idea is also conveyed by the captions and illustrations of the advertisements. The text of six of the advertisements—Nos. 2, 3, 4, 5, 6 and 7—call specific attention to present tax laws as the cause of this condition.[6] The other two speak of "tax favoritism" and "trick" taxes. The text of several of the advertisements, including Nos. 4, 5, 6 and 7, includes the suggestion that "something ought to be done" about this tax favoritism or that it should be "given critical study." Although more obvious in the case of some than others, we think it is reasonably apparent that advertisements Nos. 2 through 9 are aimed at influencing public opinion to secure legislation to correct these claimed tax inequities. Thus all of the questioned advertisements, with the exception of No. 1, are political in character, and under our System of Accounts the costs thereof should be classified to an income deductions account, specifically Account 538.

The respondents in their briefs[7] take the position that their proffered evidence fully justifies their accounting classification of the questioned entries, and contend that these

[6] Typical is the text of advertisement No. 2, which states in part:

> About 23¢ of every dollar you pay for electricity from your independent electric light and power company goes for taxes. But *because of present tax laws*, customers of federal power systems escape paying most of the taxes in their electric bills that you pay in yours. . . .
>
> Is it fair for you to have to pay extra taxes like this for customers of federal government power systems? *Shouldn't something be done about it?* [Emphasis supplied]

[7] The discussion in this Opinion disposes of respondent's arguments without differentiating between the two initial briefs they filed herein.

proceedings should be dismissed forthwith. Their arguments to support this position can be summarized under five general headings: first, a claimed lack of Commission authority to prescribe an accounting classification based upon the political character of expenditures or to classify expenditures below the line and as income deductions on this basis; second, claimed substantial evidence to support classifying their questioned expenditures as non-political rather than political; third, asserted procedural and other errors involving the promulgation and application of Accounting Interpretation E-110; fourth, asserted error in the exclusion of their proffered evidence; and fifth, claimed violations of due process and denial of freedom of speech by the accounting classification herein followed.

There is no merit to the respondents' first argument that political matters are not the Commission's concern under the Federal Power Act, and that therefore we lack authority under the law to prescribe a System of Accounts prescribing an accounting classification based on the political character of expenditures, and lack authority to enforce such an accounting requirement. Section 301(a) of the Act explicitly provides that ". . . The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class." In addition, this Section provides that "Every licensee and public utility shall make, keep, and preserve for such periods, such accounts . . . as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act. . . ." Further, Section 309 of the Act provides that "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." In our view, these provisions are sufficiently broad to authorize a System of Accounts which provides that political expenditures be

charged to a particular account, here Account 538. As the Supreme Court said in *Northwestern Electric Co.* v. *F.P.C.*, 321 U.S. 119 (1944), at pp. 122-123, "The Commission's power to prescribe a uniform system of accounting and to require [the utility] to keep accounts accordingly is not open to doubt." Nor can our authority to institute these accounting classification proceedings be doubted, in view of that part of Section 301(a), quoted *supra*, fn. 3, which in terms authorizes the Commission, after notice and opportunity for hearing, to determine to what account particular expenditures shall be charged.

Furthermore, the classification of these expenditures below the line as income deductions is necessary and appropriate for purposes of administering the Act and is reasonable thereunder. The political expenditure of utilities fall into a peculiar category. By their nature, such expenditures obviously have a doubtful relationship to rendering utility service. Hence, the classification of such expenditures routinely to operating expenses would not be consistent with the objectives of utility accounting regulation, which aims at the separate disclosure and classification of all such controversial items, so as to enable a clear understanding and a realistic appraisal of the nature thereof. Throwing all such controversial expenditures into a hotchpotch of operating expenses would tend to obscure their essential character, and make more difficult their informed analysis and proper ultimate disposition.

Other considerations also justify the classification of political expenditures such as these to deductions from income rather than to operating expenses. The function of electric utilities and licensees under the Power Act is, in accordance with the requirements of the Act, to render public service in a business affected with a public interest; and it is fair and reasonable to require the customers to pay the expenses properly incurred by the companies in rendering this service. However, on matters which are politically controversial, differences of opinion may and

frequently do exist between the companies and their customers, between management and the rate payer. The classification generally of political expenditures to operating accounts might seem to imply that such expenditures must in due course and without further question be paid by the rate payer. Such an implication would be unwarranted and possibly unfair, in view of the fact that on politically controversial matters, the opinions of management and the rate-payer may differ decidedly. Thus this accounting classification, while isolating and identifying these controversial expenditures, appropriately avoids any implication that the companies are entitled without a further showing to charge against the rate payer the cost of political programs favored by the companies but possibly opposed by those who must pay the costs of supporting these enterprises.

Of course, the question of whether the rate payer or the shareholder shall ultimately pay these particular expenses must await rate proceedings under the Act, for an accounting classification matter of this kind does not involve determining the just and reasonable rates for the utility. As the Supreme Court said in the *Northwestern Electric* decision, cited above, 321 U. S. at p. 123, such a case as this "... presents only a question of proper accounting." Thus there is no merit to respondents' contention that the Commission's treatment of these expenditures wrongfully interferes with the right of management to make such expenditures as it deems necessary to the conduct of the business. For apart from the fact that any such managerial right is subject to the reasonable limitations imposed by our System of Accounts as permitted by the statute, no consequential interference with management can result from these accounting classification proceedings, but only from rate proceedings under the Act. Likewise, there is no merit to respondents' claim that these proceedings deprive them of property and other rights without due process; here again, any such deprivation cannot result from these accounting

classification proceedings but only from rate proceedings under the Act.

Nor is the criterion of "political" expenditures too indefinite to supply a reasonable and lawful standard for the classification of expenditures under our system of accounts, as respondents claim. Such a criterion is quite as explicit as such standards as "public interest," "public convenience and necessity," and "just and reasonable," which this and other Commissions are routinely called upon to administer. We think that the employment of reason in the application of this standard, even if the standard were not supplemented by the illustrations of political activity given in Accounting Interpretation E-110 and elsewhere, is sufficient to provide clear and definite guidance as to its scope and meaning.

Respondents' second principal argument, that their proffered evidence substantially supports classifying their questioned expenditures to an operating expense account as ordinary business expenditures necessary to protect and promote their businesses in the face of governmental competition, is equally devoid of merit. Respondents' proffered evidence consisted of the proposed testimony of numerous witnesses, including accountants and members of accounting firms, industrialists, former governmental officials and members of the armed forces, educators specializing in acounting and economics and writers on these subjects, executives in utility corporations and advertising firms, and others alleged to be experts on the matters involved in these proceedings. Numerous exhibits were also offered. Summarized briefly, this evidence was to the effect that the expenditures in question were normal and ordinary business outlays for the purpose of meeting competition from electric systems owned or subsidized by the government, and that the respondents were compelled by business necessity to make these expenditures in order to hold and benefit existing customers, attract new customers, and maintain company good will and financial integrity. In addition,

there was some testimony explicitly that the advertisements were "non-political" in character. According to the respondents, this proffered evidence shows that the advertisements were not intended to affect or influence the election or defeat of any candidate for office, to advocate or oppose the enactment or repeal of legislation, or in any other way to accomplish a political purpose, and thus establishes the non-political character of the advertisements.

However, as shown above, the essentially political character of the advertisements is conclusively established by the advertisements themselves, and so clearly does this fact appear that it is difficult to conceive of any evidence that would justify a different conclusion. Assuming *arguendo* that respondents' proffered evidence shows that the expenditures have some other additional or subsidiary aspect or purpose—that, for example, they were necessary to meet governmental competition, to protect the companies' markets, and to preserve their financial well-being—this would not detract from their fundamentally political character, nor would it justify classifying them under our System of Accounts other than in the manner we find to be appropriate for political expenditures. As to the relatively small amount of opinion testimony sought to be adduced by respondents that the advertisements were "non-political," we have considered with care this evidence, which is in the record before us. And we have concluded that, in view of the self-evident facts attested by the advertisements themselves, this evidence too, even when to it is added all the other evidence proffered by the respondents, is of insufficient weight to establish that the advertisements are in fact non-political in character.

Turning to respondents' third principal contention, that we committed procedural and other errors in the promulgation and application of Accounting Interpretation E-110, the respondents argue that this formal Interpretation is the Commission's only basis for classifying political expenditures below the line to Account 538, and contend that the

Commission never formally approved or adopted this Interpretation, which they allege was issued in 1945 not by the Commission but by the National Association of Railroad and Utilities Commissioners, through its Committee on Statistics and Accounts. They argue that Interpretation E-110 has never been promulgated as a rule or regulation of the Federal Power Commission, and has never been published in the Federal Register, contrary to the provisions of Section 3 of the Administrative Procedure Act, requiring the publication of "substantive rules . . . and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public . . ." They contend that now for the first time in the Commission's history, without notice or hearing, we have undertaken to apply Accounting Interpretation E-110 so as to require that their ECAP expenditures be charged below the line. This action, they say, is contrary to the so-called Karg-Safeblade Report in 1944, which they allege approved the charging of ECAP expenditures like those in question to Account 787.2, not Account 538. And they contend that, in any event, by action taken at the 1958 convention of the National Association of Railroad and Utilities Commissioners, an attempt was made to introduce this interpretation into the Association's proposed revision of its System of Accounts by including the substance of the interpretation in a note to be appended to Account 426, the counterpart of present Account 538, but that in Committee the note was eliminated from the proposed revision and hence was in effect eliminated from the System of Accounts.

These arguments too cannot withstand analysis. Accounting Interpretation E-110, adopted in 1945, is not the sole basis for the classification of political expenditures to Account 538, as respondents contend; it constitutes merely a summarization, with illustrative instances, of the accounting classification requirements already embodied in the System of Acounts, as adopted and interpreted by the Federal Power Commission. As described above, our System

of Accounts first became effective in 1937; and as early as 1940, the Commission instituted an investigation into the accounting disposition of expenditures for political purposes by Northwestern Electric Company and certain other utilities, some of which are respondents herein. In the opinion issued on February 27, 1941, in those proceedings, *Matter of Northwestern Electric Company, et al.*, 2 F. P. C. 369, referring at page 376 to "Extensive advertising and radio programs featured by the utilities during political campaigns," it was pointed out that "Many of these definitely political advertising and radio programs were charged to operating expenses:"[8] The Commission found that these (p. 374) ". . . accounting practices followed by these utilities, individually and collectively, . . . disregarded the fundamentals of good accounting, and violated the Uniform System of Accounts prescribed by the Federal Power Commission." And the opinion concluded by stating that the Commission would issue such orders and regulations in connection with such accounting entries as was deemed requisite and authorized by the Power Act.

Thus it was reasonably evident to the public and to all possibly affected interests that our System of Accounts precluded the classification of political expenditures, including political advertising expenditures, to operating expenses. And it was equally clear from that opinion, in conjunction with the instructions accompanying Account 538, reading "This account shall include miscellaneous debits to income not provided for elsewhere," that political expenditures,

[8] The similarity between the advertisements involved there and those in issue here is indicated by the following language, quoted from 2 F.P.C. 376:

> . . . For example, "advertisements with reference to PUD's and related matters" during 1950, "advertisements re condemnation elections," and political advertisements entitled "Where Do We Go From Here?" and the like, were charged to Account 787 to which only charges for promotion of sales of electric energy should have been made.

including expenditures for political advertisements, should be charged to income deductions. The fact that the NARUC likewise adopted this interpretation of its System of Accounts, as set forth in Accounting Interpretation E-110, or the fact that we have, for convenience and uniformity, regarded the NARUC interpretation as interpreting our System of Accounts,[9] does not detract from our prior interpretation of our System of Accounts, nor does it give rise to any errors in the promulgation of this interpretation of the System of Accounts or its application to respondents.

We do not think that the Administrative Procedure Act required the re-publication of the interpretation contained in our *Northwestern* opinion in 2 F. P. C. 376 summarized above, any more than it required the re-publication of all the other rules, principles, holdings and interpretations of the countless other opinions and orders issued by this and other Commissions up to the time of the enactment of that statute. Such a requirement plainly would have been unreasonable and impossible for compliance. Nor was any

---

[9] We stated in the Commission's Twenty-Sixth Annual Report for 1946 (p. 39):

> In obtaining uniformity of accounting, the staff of the Commission has cooperated closely with the Committee on Statistics and Accounts of the National Association of Railroad and Utilities Commissioners. Periodically there have been meetings of accounting representatives of the Commission and the NARUC for the discussion of problems regarding the proposed revision of the systems of accounts, interpretations, reports, etc. The accounting representatives of both bodies from time to time confer with accounting representatives of the industries for their views and suggestions.
>
> When questions of interpretation have arisen, they have been submitted to the various members of the NARUC Committee or discussed in meetings; and when a substantial uniformity of opinion was reached, the interpretations have been issued through the NARUC and regarded as likewise interpreting the Commission's systems of accounts, although not formally approved by the Commission. Thus, uniformity has been accomplished relative to the questions submitted, and the interpretations made applicable to various companies of the industries throughout the United States.

notice or publication of this accounting classification required in addition to that given by the Commission. The Karg-Safeblade report, a staff report which was supplemented by a press release, is not efficacious to modify or rescind an interpretation issued and followed by the Commission in the manner set forth above. The circumstances surrounding issuance of this report justify adherence to this rule, not an exception to it.[10] Finally, even accepting the questionable assumption that the Committee action referred to above amounted to the formal amendment of the NARUC's interpretation of its System of Accounts by the deletion of Accounting Interpretation E-110, this action, which in any event was taken after the improper accounting classifications were made by the respondents, does not automatically bind us and is subject to our review and possible rejection if we consider such a course justified.

Nor is there any merit to respondents' contention that the instructions accompanying certain of the Accounts support their classification of the questioned expenditures. The controlling standard is the interpretation we have placed on our System of Accounts summarized above, under which political expenditures are classified to an income deductions account. Respondents contend in effect that Instruction 2-F of our System of Accounts,[11] on which they particularly rely, contemplates that only charges which are not just and reasonable should be included in Account 538, and allege that their ECAP expenditures have been shown just and reasonable in this case. However, an accounting classifica-

[10] The Karg-Safeblade Report was but a summary report covering a limited investigation and, undertaken in the face of World War II personnel and budgetary limitations, does not purport to prescribe any specific accounting entries.

[11] Instruction 2-F provides:

"All charges to the accounts prescribed in this system for electric plant, income, operating revenues, and operating expenses shall be just and reasonable, and any payments by the utility in excess of just and reasonable charges shall be included in Account 538, Miscellaneous Income Deductions."

tion proceeding such as this is not the place to determine the justness and reasonableness of these expenditures, nor does Instruction 2-F contemplate any such result; it merely places the burden on the utility at the outset to exclude from operating expense accounts operating expenses the justness and reasonableness of which is in doubt and charge them to Account 538, below the line. The propriety of such an accounting classification is subject to Commission review in this or other appropriate proceedings, while the justness and reasonableness of the charge is subject to Commission review only in a rate proceeding.

The foregoing is also largely dispositive of respondents' fourth principal argument, that we erred in excluding most of the evidence they sought to adduce. As found above, with one exception the nine questioned advertisements are on their face political in character. Most of the evidence respondents offered is not relevant to the question whether the advertising expenditures are political in character, the issue framed by our order instituting these proceedings, but pertains to some other issue, such as whether the questioned expenditures are ordinary and necessary business expenses or whether they are just and reasonable. In any event, as also found above, the totality of the evidence proffered by the respondents, which is before us in an offer of proof and which we have examined with care, is not sufficient to establish that the advertisements are in fact other than political in character.

Finally, we must reject respondent's contention that the classification of the questioned advertising expenditures below the line because of their political character would deprive respondents of constitutionally protected rights of due process of law and freedom of speech. Since the mere classification of their questioned expenditures below the line has no material adverse impact on respondents, it does not deter persons from freedom of speech by a prior restraint, the action characterized as improper in *Speiser* v. *Randall*, 357 U. S. 517. Respondents remain free to make

their questioned expenditures without restraint or penalty; they must, however, account for them in the manner we have found reasonable and appropriate under the Act. And since these accounting classification proceedings do not disturb any of respondents' property or other rights, which are subject to determination not here but in rate proceedings, there is no deprivation of property without due process of law. Likewise, there is not present here any violation of procedural due process such as that condemned in *Speiser;* the method provided by Congress in Section 301(a) of the Act for effecting the reclassification of these expenditures, and its application by the Commission, is fair and non-discriminatory.

Although this question is not involved here, it appears that even the deduction of the questioned expenditures from respondents' income in future rate proceedings would not constitute an impermissible interference with freedom of speech, for freedom of speech is not absolute but is subject to reasonable limitations, in the public interest. Thus, *Cammarano* v. *U. S.*, 358 U. S. 498, in holding that sums expended by a taxpayer in furtherance of publicity programs to help secure the defeat of an initiative measure, which would destroy his business, can properly be determined not to constitute deductions as ordinary and necessary business expenses under the Internal Revenue Code, makes it clear that even the disallowance of such expenditures would not constitute a denial of freedom of speech. Clearly then, the mere classification of the questioned expenditures to Account 538 does not constitute any violation of freedom of speech.

We have considered with care the numerous other contentions advanced by respondents but find that they are without substantial support in fact or reasonable basis in law. Accordingly, they should be denied.

Finally, our show cause order issued August 1, 1958, required each respondent to show cause why it should not reclassify to Account 538 amounts consisting of 43.25 per-

cent of the total amount charged by each respondent to its accounts reflecting ECAP expenditures, as shown in Column 5 of Table A to the said order, and set forth in Column 5 of Appendix B hereto. Inasmuch as we have found that the first of the nine advertisements is not political in nature, the figure of 43.25 percent should be reduced to give effect to this finding. Correction in monetary amounts for this factor may reasonably be accomplished by reducing the aforesaid percentage by one-ninth to 38.45 percent in the case of each respondent, and reducing the monetary amounts shown in Column 5 of Appendix B hereto correspondingly.

The Commission further finds:

(1) The respondents in these proceedings should, as prescribed in the order hereto, reclassify their respective expenditures in connection with the 1957 ECAP Program for advertisements Nos. 2 through 9 shown in Appendix A hereto, to Account 538 in their accounts, in accordance with the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees, and in compliance with this Opinion and order.

(2) Within 120 days from the date of issuance of this Opinion and order, each respondent should file with the Commission and satisfactory to it a statement in writing and under oath by an officer of the company attesting that the accounting reclassification required herein has been effected; and showing the details of such reclassification. Pending further Commission order respecting this matter, the instant proceedings should remain in full force and effect.

The Commission orders:

(A) The respondents in these proceedings shall, through memorandum journal entries in their books of account and on original source documents, reclassify their respective

expenditures in connection with the 1957 ECAP Program for advertisements Nos. 2 through 9 shown in Appendix A hereto, to Account 538 in their accounts, in accordance with the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees, and in compliance with this Opinion and order.

(B) The amounts which the respondents shall reclassify to Account 538 in their accounts shall be the amounts shown in Column 5 of Appendix B hereto, adjusted by reducing the figure of 43.25 percent shown in connection with Column 5 to 38.45 percent, and reducing the monetary amounts applicable to each company correspondingly.

(C) Within 120 days of the date of issuance of this Opinion and order, each respondent shall file with the Commission and satisfactory to it a statement in writing and under oath by an officer of the company attesting that the accounting reclassification required herein has been effected, and showing the details of such reclassification. Pending further Commission order respecting this matter, the instant proceedings shall remain in full force and effect.

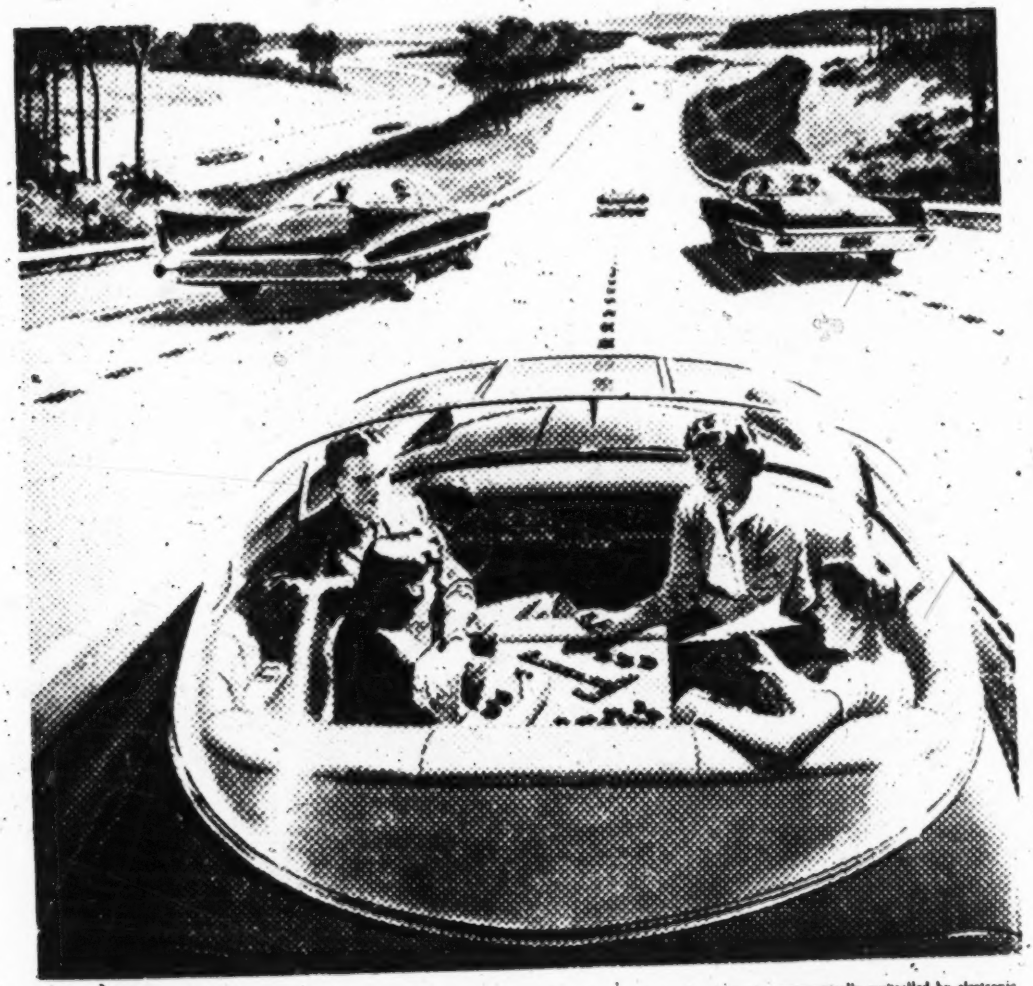
By the Commission.

Commissioner Sweeney not participating.

JOSEPH H. GUTRIDE,
Secretary.

Appendix F.

The Saturday Evening Post — December 29, 1956 January 21, 1957 — Look — Collier's — January 22, 1957 March 1, 1957



ELECTRICITY MAY BE THE DRIVER. One day your car may speed along an electric super-highway, its speed and steering automatically controlled by electronic devices embedded in the road. Travel will be more enjoyable. Highways will be made safer—by electricity! No traffic jams . . . no collisions . . . no driver fatigue.

POWER COMPANIES BUILD FOR YOUR NEW ELECTRIC LIVING

Your air conditioner, television and other appliances are just the beginning of a new electric age.

Your food will cook in seconds instead of hours. Electricity will close your windows at the first drop of rain. Lamps will cut on and off automatically to fit the lighting needs in your rooms. Television "screens" will hang on the walls. An electric heat pump will use outside air to cool your house in summer, heat it in winter.

You will need and have much more electricity than you have today. Right now America's more than 400 independent electric light and power companies are planning and building to have twice as much electricity for you by 1967. These companies can have this power ready when you need it because they don't have to wait for an act of Congress—or for a cent of tax money—to build the plants.

The same experience, imagination and enterprise that electrified the nation in a single lifetime are at work shaping your electric future. That's why in the years to come, as in the past, you will benefit most when you are served by independent companies like the ones bringing you this message—*America's Independent Electric Light and Power Companies**.

*Company names on request through this magazine.

Appendix F.

are you aware of this strange use of your tax money?

Several million U. S. families and businesses get their electricity from federal government electric systems like the TVA. *And your taxes help pay their electric bills!* Here's how:

About 23¢ of every dollar you pay for electricity from your independent electric light and power company goes for taxes. But because of present tax laws, people who get electricity from government plants escape paying most of the taxes in *their* electric bills that you pay in *yours*. They pay taxes of only about 4¢ per dollar if their power comes from the government's TVA, for example. So to make up for the lost tax revenues which federal power projects *don't* pay, you have to be taxed *more*.

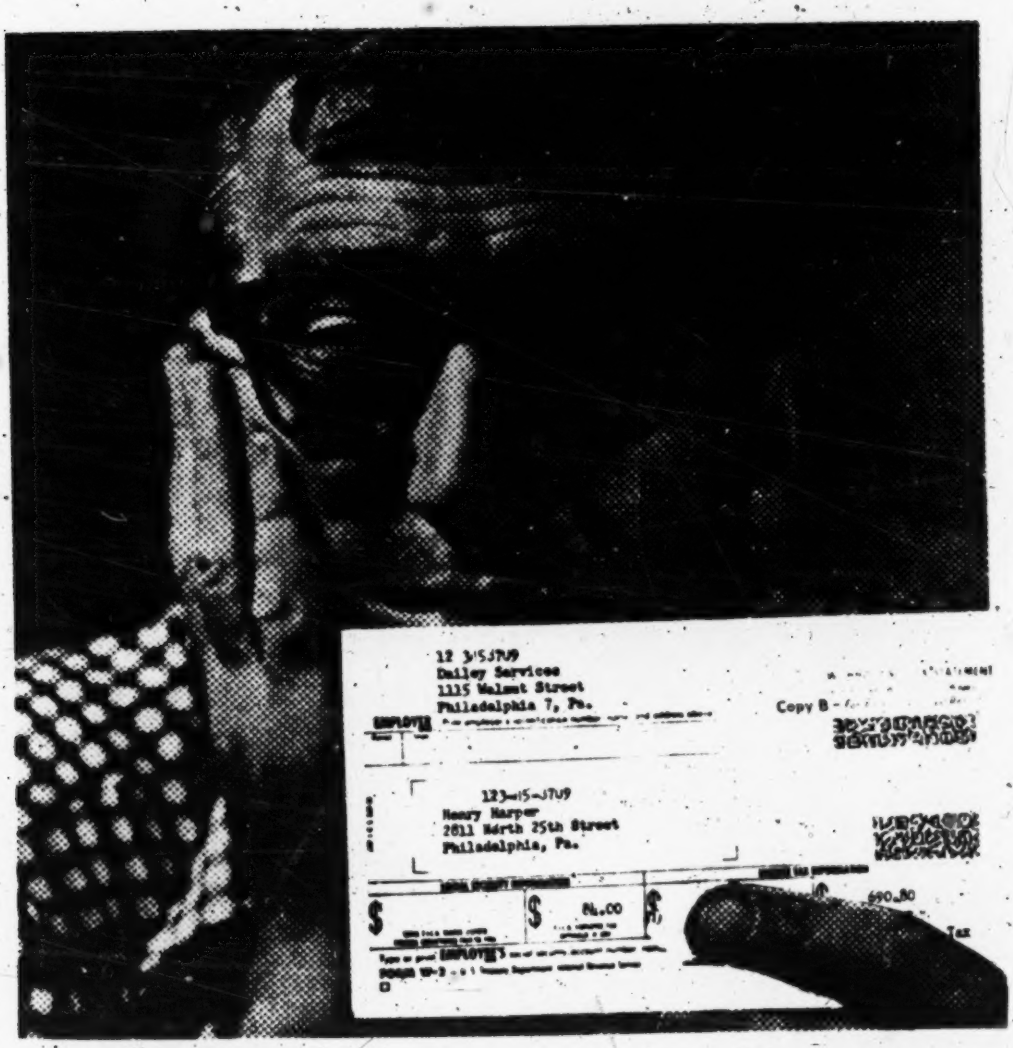
Don't you think something ought to be done about this unfair tax favoritism? *America's Independent Electric Light and Power Companies**.

*Company names on request through this magazine

Broadcasting-Telecasting	December 17, 1956
Editor & Publisher	December 22, 1956
American Press	January, 1957
Atlantic	February, 1957
Saturday Review of Literature	February 16, 1957

Appendix F.

The Saturday Evening Post	January 26, 1957	Collier's	February 1, 1957
Life	January 28, 1957	Look	February 19, 1957



Where do your taxes go?

You may have a pretty good idea where taxes go. But did you know that some go to help pay other people's electric bills?

They're the families and businesses that get their electricity from federal government electric systems like the TVA.

While about 23¢ of every dollar you pay for electricity from your power company goes for taxes, those other people pay much less . . . only about 4¢ per dollar if their power comes from the government's TVA, for example. As a result, you are taxed *more* to make up for what *they don't have to pay.*

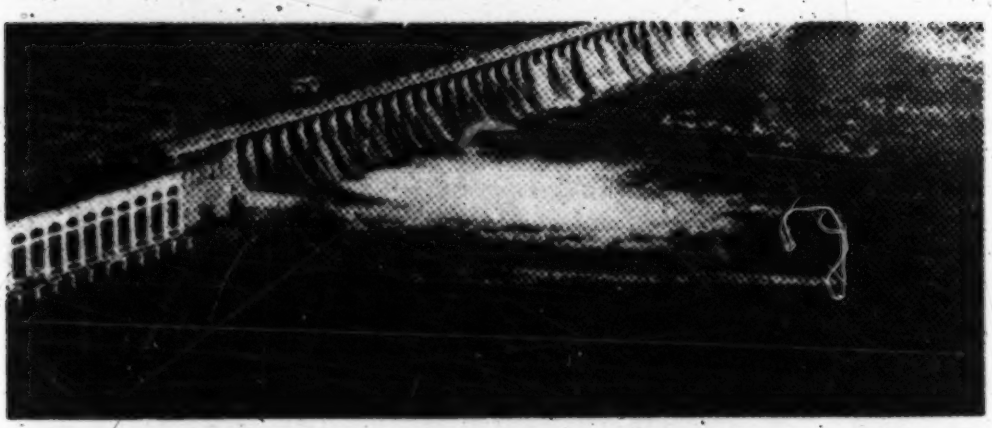
Don't you think this unfair tax favoritism needs thorough study and discussion? *America's Independent Electric Light and Power Companies**.

* Company names on request through this magazine

Appendix F.

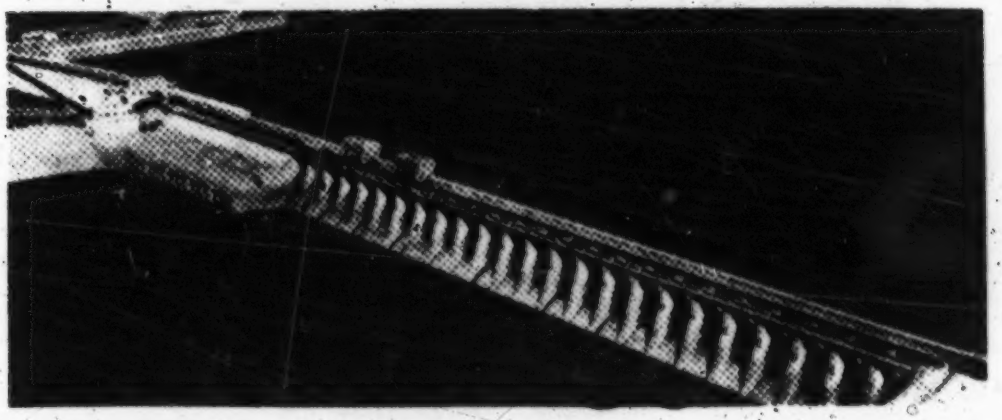
The Saturday Evening Post — February 16, 1957
Life — May 20, 1957
Look — June 25, 1957

Why do customers of this power dam...



This power dam was built on the Susquehanna River near the Pennsylvania-Maryland border by the local independent electric light and power company at no cost to taxpayers.

have to help pay electric bills for customers of this one?



This TVA power dam was built on the Tennessee River near Paducah, Kentucky, by the federal government with millions of dollars that you and other citizens paid in taxes.

Your taxes help *build* federal government power plants like the one in the lower picture. And these plants *keep on* costing you money year after year. Here's how.

About 23¢ of every dollar you pay for electricity from your independent electric light and power company goes for taxes. But because of present tax laws, customers of federal power systems escape paying most of the taxes *in their* electric bills that you pay in yours. They pay taxes of only about 4¢ per dollar if their power comes from the federal government's TVA power system, for example. So to make up for the lost tax revenues which federal power projects don't pay, you have to be taxed more.

Is it fair for you to have to pay extra taxes like this for customers of federal government power systems? Shouldn't something be done about it? *America's Independent Electric Light and Power Companies*

Printed in the interest of through this medium

Appendix F.

The Saturday Evening Post	March 30, 1957
Life	April 1, 1957
Look	April 2, 1957

This trick's on you!

A bucket of water over the door is one of the risks of April Fool's Day. But being tricked on other days is something else again.

Yet that's what happens so far as your taxes are concerned. Part of your taxes are used to help pay the cost of electric service for customers of federal government power systems.

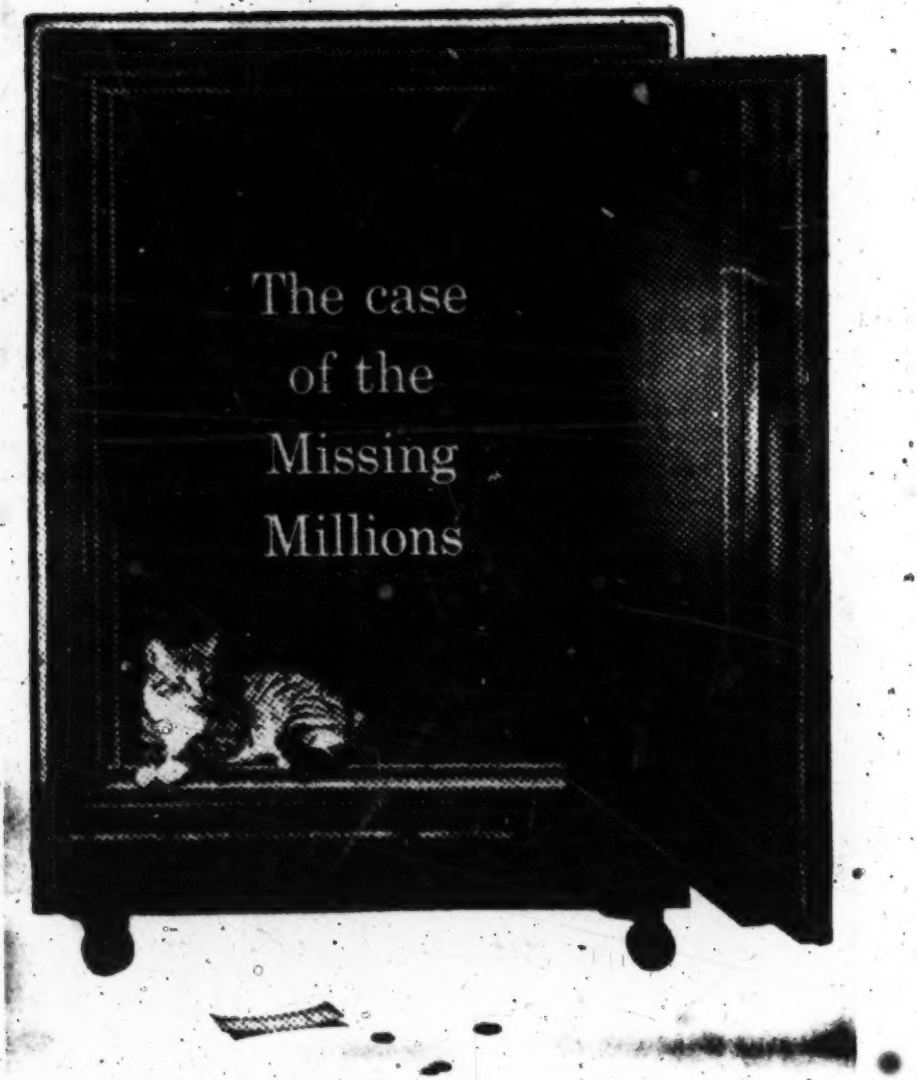
First, your taxes help build the federal power plants that produce electricity for these people. Then, you have to be taxed *more* because they don't pay all the taxes in *their* electric bills that you pay in yours. People who get electricity from the TVA, for example, pay less than one-fifth of the taxes on electric service that you pay.

Next time you hear someone talk in favor of federal government electricity, ask him about the trick it plays with your taxes (and his). Chances are, he'll stop talking and start thinking. *America's Independent Electric Light and Power Companies**

*Company names on request through this magazine

Appendix F.

The Saturday Evening Post — May 11, 1957
Life — June 24, 1957
Look — August 20, 1957



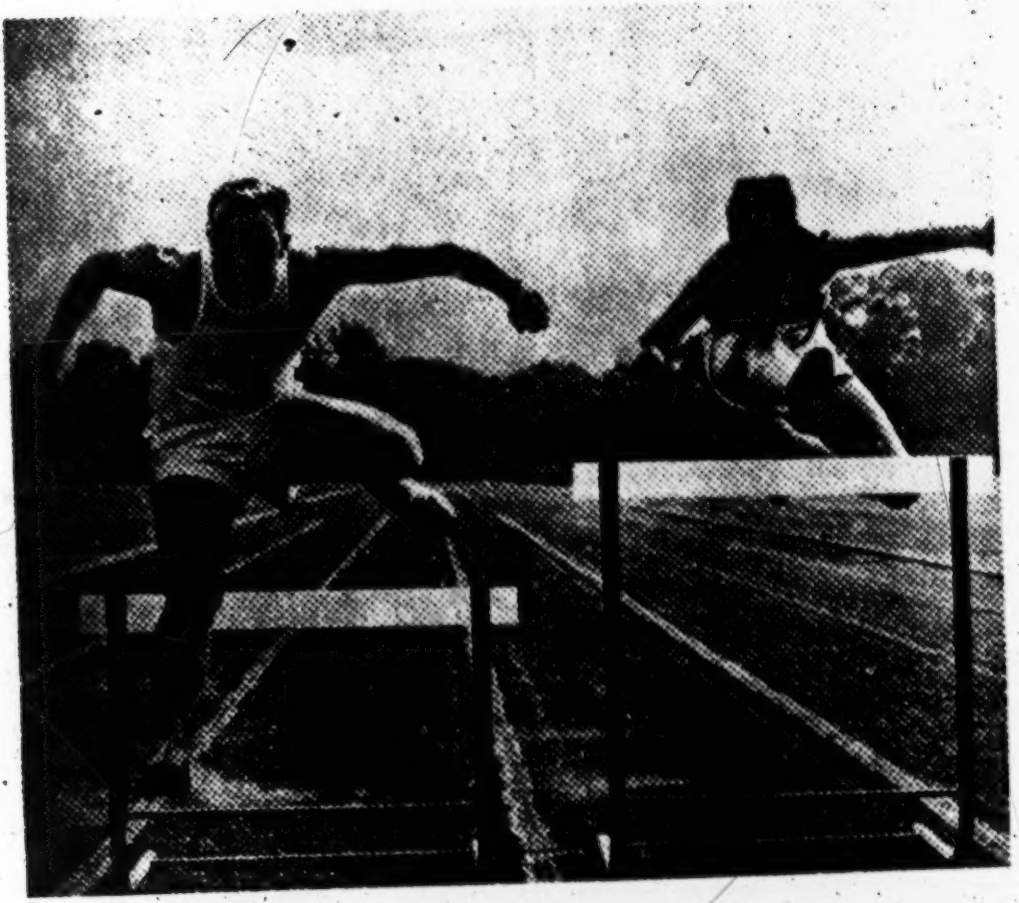
Millions of tax dollars are lost every year through a strange kind of tax favoritism. And you are taxed extra to help balance the loss.

As a customer of an independent electric light and power company, about 23¢ out of every dollar you pay for electricity goes for taxes. But because of present tax laws, people served by federal government power systems escape paying most of the taxes in their electric bills that you pay in yours. They pay taxes of only about 4¢ per dollar on power from the government's TVA, for example. So to make up for the tax revenues which federal power projects don't pay, you have to be taxed *more*.

Don't you think that *every* American should carry his fair share of taxes? *America's Independent Electric Light and Power Companies.**

*Company names on request through this magazine

Appendix F.



Would you call this fair play?

Number 5 has to take the high hurdles—number 3 gets by with the *low*. Would you call *this* a fair race?

Hardly—but you face that same kind of unfairness every day as far as your taxes are concerned. Here's how:

Part of every dollar you pay for electricity goes for taxes. But a strange twist in federal laws exempts several million American families and businesses from paying all the taxes in their electric bills that you pay in yours. These are the people who get their electricity from federal government electric systems. Like runner number 3, they enjoy lower tax hurdles while you and most other people strain over the high ones.

This kind of tax favoritism is a far cry from American standards of fair play. That's why we believe it should be made widely known and given critical study.

"America's Independent Electric Light and Power Companies"*

*Name supplied on request through this magazine

The Saturday Evening Post — July 27, 1957
Life — August 19, 1957
Look — September 17, 1957

Appendix F.

Can you answer these questions about taxes?

Q: Do you pay taxes in your electric bill?

A: Yes. In fact, about 23¢ out of every dollar on the average family electric bill goes for taxes.

Q: Does everyone pay this much tax in his electric bill?

A: No. Several million American families and businesses pay a far smaller tax—only a fraction of the tax you pay.

Q: Who are these "privileged" people?

A: People who get electricity from federal government electric systems.

Q: Why don't they pay the same taxes you pay?

A: A strange twist in federal law exempts them from paying most of the taxes in electric bills that you pay *because they get their electricity from federal electric systems.*

Q: Isn't that unfair? Shouldn't every American pay his fair share of taxes?

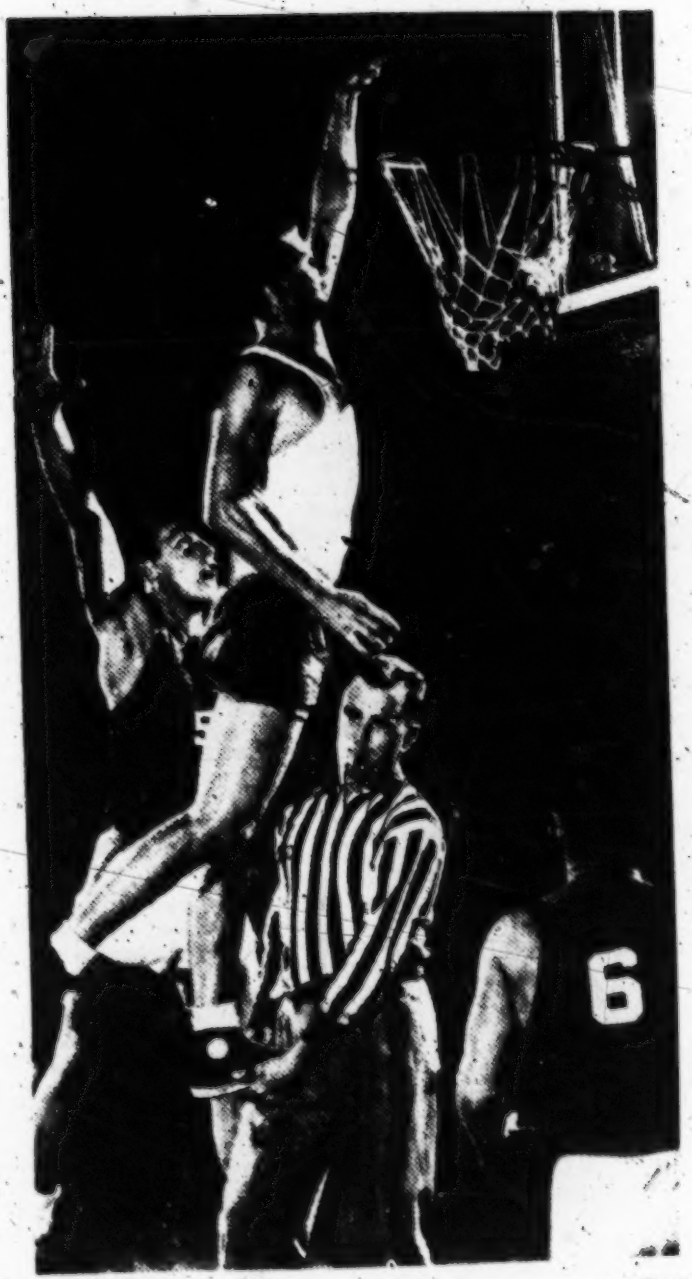
A: Yes. American standards of fair play call for each citizen to pay his fair share of taxes.

America's Independent Electric Light and Power Companies*

*Names sent on request through this magazine

The Saturday Evening Post August 17, 1957
Life September 23, 1957
Look October 1, 1957

Appendix F.



Would you call this fair play?

Referee gives "Visitors" a boost—"Home" team has to score on its own. What kind of a game would *that* be?

Ridiculous—yet you and most people face that same kind of unfairness all the time with some of your taxes. These are the taxes you pay in your electric bills.

About 23 cents out of every dollar you pay for electricity goes for taxes. But a strange twist in federal law exempts several million American families and businesses from paying all the taxes in their electric bills that you pay in yours. These are people whose electricity comes from federal government electric systems. You have to help make up the taxes these people don't pay.

Most Americans feel that everyone should pay his fair share of taxes. Don't you agree that this special tax favoritism should be made more widely known and given critical study?

America's Independent Electric Light and Power Companies

Appendix F.

APPENDIX B

Column (1) Company	*Column (2)* FPC Account No. Debited Acct. 787, Demonstration, Advertising and Other Sales Expenses	*Column (3)* FPC Account No. Debited Acct. 801, Miscellaneous General Expenses	*Column (4)* Total Contribution to E.C.A.P. for 1957	*Column (5)* Portion of Total Contribution Classified by Staff in Income Acct. 538, Miscellaneous Income Deductions (43.25%)
Alabama Power Company	$ 40,956.25	$	$ 40,956.25	$ 17,713.58
Arizona Public Service Company	13,181.31		13,181.31	5,700.91
Arkansas Missouri Power Company	3,890.60		3,890.60	1,682.68
Arkansas Power & Light Company		23,477.07	23,477.07	10,153.83
Blackstone Valley Gas & Electric Company	6,699.50		6,699.50	2,897.53
Boston Edison Company	35,713.27		35,713.27	15,445.99
Carolina Power & Light Company	10,791.80	20,041.92	30,833.72	13,335.58
Central Hudson Gas & Electric Corporation		11,366.38	11,366.38	4,915.96
Central Illinois Public Service Company	20,289.97		20,289.97	8,775.41
Central Louisiana Electric Company, Inc.	8,210.50		8,210.50	3,551.04
Delaware Power & Light Company		9,590.70	9,590.70	4,147.98
Duquesne Light Company		34,695.44	34,695.44	15,005.78
El Paso Electric Company	7,376.20		7,376.20	3,190.21
Empire District Electric Company	6,378.80		6,378.80	2,758.83
Fitchburg Gas & Electric Company		1,829.70	1,829.70	791.35
Georgia Power Company	41,676.97		41,676.97	18,025.29
Gulf Power Company	7,537.90		7,537.90	3,260.14
Gulf States Utilities Company	22,162.33		22,162.33	9,585.21
Hartford Electric Light Company, The		10,398.56	10,398.56	4,497.38
Connecticut Power Company, The§		10,096.90	10,096.90	4,366.91
Holyoke Water Power Company	2,500.00		2,500.00	1,081.25
Idaho Power Company		11,934.77	11,934.77	5,161.79
Interstate Power Company	9,638.90		9,538.90	4,125.57
Iowa Public Service Company		11,816.02	11,816.02	5,110.43
Jersey Central Power & Light Company		19,683.28	19,683.23	8,513.02
Kansas Gas & Electric Company		14,619.84	14,619.84	6,323.08
Lake Superior District Power Company		2,836.20	2,836.20	1,226.66
Louisiana Power & Light Company	18,306.63		18,306.63	7,917.62
Marietta Electric Company, The	1,451.60		1,451.60	627.82
Merrimack-Essex Electric Company				
Lawrence Electric Company§	4,170.40		4,170.40	1,803.70
Lowell Electric Light Corporation, The§	4,627.20		4,627.20	2,001.26
Metropolitan Edison Company	20,994.10		20,994.10	9,079.95
Minnesota Power & Light Company		7,396.10	7,396.10	3,198.81
Mississippi Power Company	9,569.80		9,569.80	4,138.94
Mississippi Power & Light Company		15,420.92	15,420.92	6,669.55
Mississippi Valley Public Service Company		1,636.30	1,636.30	707.70
Missouri Edison Company	1,402.50		1,402.50	606.58
Missouri Power & Light Company	6,313.80		6,313.80	2,730.72
Monongahela Power Company	17,582.94		17,582.94	7,604.61
Montana Power Company, The		12,977.64	12,977.64	5,612.83
Monterey Utilities Corporation	64.90		64.90	28.07
Narragansett Electric Company, The	17,893.02		17,893.02	7,738.73
New Jersey Power & Light Company		9,593.30	9,593.30	4,149.10
New Orleans Public Service, Inc.	15,917.78*		15,917.78	6,884.44
New York State Electric & Gas Corporation		33,410.80	33,410.80	14,450.17
Northern States Power Company of Wisconsin	5,963.68		5,963.68**	2,579.29
Northern States Power Company of Minnesota	37,457.40		37,457.40	16,200.33
Northern Virginia Power Company	2,616.60		2,616.60	1,131.68

Appendix F.

Column (1) Company	*Column (2)* FPC Account No. Debited Acct. 787, Demonstration, Advertising and Other Sales Expenses	*Column (3)* FPC Account No. Debited Acct. 801; Miscellaneous General Expenses	*Column (4)* Total Contribution to E.C.A.P. for 1957	*Column (5)* Portion of Total Contribution Classified by Staff in Income Acct. 535, Miscellaneous Income Deductions (43.26%)
Ohio Edison Company	22,308.47		38,462.88	16,635.20
Oklahoma Gas & Electric Company	26,228.90		26,228.90	11,344.00
Orange and Rockland Utilities, Inc.				
Orange and Rockland Electric Company, The§	1,789.00		5,059.70	2,188.32
Rockland Light & Power Company§	5,059.70		5,509.70	2,188.32
Pacific Gas & Electric Company		55,000.00	55,000.00	23,787.50
Pacific Power & Light Company	25,265.99		25,265.99	10,927.54
Pennsylvania Electric Company	31,135.00		31,135.00	13,465,89
Pennsylvania Power Company	4,591.10	3,324.60	7,915.70	3,423.54
Pennsylvania Power & Light Company		46,544.84	46,544.84	20,130.64
Philadelphia Electric Company		55,000.00	55,000.00	23,787.50
Potomac Edison Company, The	7,348.30		7,348.30	3,178.14
Potomac Electric Power Company	26,731.86		26,731.86	11,561.53
Potomac Light & Power Company	3,281.50		3,281.50	1,419.25
Public Service Company of Indiana, Inc.		28,953.59	28,953.59	12,522.43
Puget Sound Power & Light Company		17,126.01	17,126.01	7,407.00
Rockland Electric Company	1,877.70		1,887.70	816.43
South Carolina Electric & Gas Company	15,269.32		15,269.32	6,603.98
South Penn Power Company	1,637.90		1,637.90	708.39
Southwestern Gas & Electric Company		16,847.01	16,847.01	7,286.33
Southwestern Public Service Company	15,676.05		15,676.05	6,779.89
Suburban Electric Company	7,913.40		7,913.40	3,422.55
Superior Water, Light and Power Company	1,095.70		1,095.70	473.89
Union Electric Company		40,471.15	40,471.15	17,503.77
Utah Power & Light Company	16,993.55		16,993.55	7,349.71
Virginia Electric & Power Company	45,187.44		45,187.44	19,543.57
Washington Water Power Company, The		12,768.98	12,768.98	5,522.58
West Maryland Power Company, The	329.60		329.60	142.55
West Penn Power Company	29,243.81		29,243.81	12,647.95
West Texas Utilities Company	10,126.40		10,126.40	4,379.67
Western Massachusetts Electric Company	12,588.00		12,588.00	5,444.31
Worcester County Electric Company	18,145.38		18,145.38	7,847.88
	$731,070.72	$555,012.43	$1,286,083.15	$556,230.96

* Reported by non-FPC account as Account 176-1, General Publicity Advertising.

** Contribution made through parent company, Northern States Power Company of Minnesota.

§ Predecessor merged corporation.

APPENDIX C.

Order Denying Applications for Rehearing and Requests for Stay.

(Issued October 11, 1960)

Applications for rehearing of the Commission's Opinion No. 337 and accompanying order issued in the above-entitled proceeding were filed on September 12, 1960, by Southwestern Electric Power Company, and on September 15, 1960, by Alabama Power Company and a number of other respondents herein jointly. The applications also request that, if the Commission denies rehearing and the other relief requested in the applications, we grant a stay of the Commission's said opinion and order until 120 days after the disposition of the applications of rehearing or entry of a final order after judicial review, whichever is later.

In general, the points raised and matters argued in the applications for rehearing are sufficiently discussed or adequately dealt with in Opinion No. 337 and accompanying order. Only with respect to two matters is brief discussion warranted.

First, the Alabama Power group of respondents contend in their application that we erred in Opinion No. 337 in construing our August 1, 1958 order instituting this proceeding as framing the single question of whether the questioned advertising expenditures were political in character. Of course, the August 1, 1958 order in terms expressly provided by paragraph (D) thereof that (20 F.P.C. 108, 113):

> (D) At the hearing ordered herein each of the above-entitled Companies shall present any justification there may be for its (or indicated predecessor) respective accounting entry or entries herein questioned; and shall show cause, if any there be, why it should not, by an appropriate memorandum accounting entry reclassify to Account 538, the respective

dollar amount shown in Column (5) of the attached Table A opposite its (or indicated predecessor) corporate name.

Thereafter, on July 15, 1959, in Opinion No. 323 and accompanying order issued in this proceeding, we considered an appeal by respondents from a ruling by the examiner excluding evidence when proffered by respondents to show, *inter alia*, that their disputed advertising expenditures were necessary to counter the competition of government owned and subsidized electric power facilities and to protect respondents' businesses from such competition, and that therefore such expenditures were ordinary, necessary, just and reasonable and non-political expenditures of respondents. In affirming the examiner's ruling excluding such evidence, we held (22 F.P.C. 72, 76-77).

> With one exception, the nine questioned advertisements appear on their face to involve the presentation of argument in matters of political controversy, or have as their primary purpose the influencing of public opinion as to proposed legislation or the repeal of existing laws, and have a direct relationship to political matters. In our judgment, the evidence thus far proffered in this proceeding is without probative value to show the contrary with respect to any of these advertisements. Moreover, accepting *arguendo* the contention of certain of the companies that the proffered evidence is admissible because relevant to the issue of whether the questioned advertisements are political or non-political in character, it is without weight to prove that these advertisements are in fact non-political. Accordingly, the proffered evidence need not be admitted with respect to this issue. However, since certain of the companies have indicated that they may wish to present other types of evidence which they deem material and relevant to show the non-political character

of the advertisements, we will return this case to the presiding examiner for further proceedings consistent with our ruling herein.

In the light of our settled interpretation of our Uniform System of Accounts, the presiding examiner should not admit the evidence sought to be adduced by the companies to show that these advertising expenditures have some other, additional or subsidiary aspect of purpose which in the companies' view justifies giving them an accounting treatment other than that we have heretofore considered appropriate; nor should he receive any other similar evidence that is immaterial or irrelevant to the issues in this proceeding. (Footnote omitted)

Obviously, this ruling was determinative with respect to the admission of evidence in the subsequent hearing, as the record shows, and no contrary implication was intended or should be arrived at, on the basis of the language in Opinion No. 337 challenged by respondent, or on any other basis.

Nor is there any basis for inferring from our discussion of the respondents' proffered evidence that we reversed our evidentiary ruling in Opinion No. 323 or the examiner's rulings thereunder. Respondents' proffered evidence is in the transcript in this case in the form of offers of proof and otherwise, and we may properly examine it in evaluating respondents' arguments and objections. And on such an examination we have concluded, as fully set forth in Opinion No. 337, that such evidence, including the evidence proffered to show the claimed non-political character of the advertisements, has not sufficient probative force to establish that the advertisements are in fact non-political. This lack of probative force results from the fact, *inter alia*, that respondents evidently consider that whether the expenditures were "political" or "non-political" depends on whether they were made to meet governmental compe-

tition in the field of business, a conception wholly at odds with the Commission's definition of "political" embodied in its System of Accounts.

Apart from this circumstance, the exclusion of respondents' opinion and other evidence explicitly that the advertising expenditures were "non-political" in character is further justified by the fact, also emphasised in Opinion No. 337, that such evidence was offered basically to prove some other or subsidiary matter not at issue in this proceeding, such as whether the questioned expenditures were just and reasonable, or was so based on or intermingled with such irrelevant evidence as to justify the exclusion of such questionable material in its entirety.

The Commission finds:

The petitions for rehearing referred to hereinabove set forth no new facts and no principles of law which either were not fully considered by the Commission in issuing Opinion No. 337 and accompanying order, or which, having now been considered, warrant any change in, modification of, or rehearing with respect to such opinion and order. Nor is there any justification for a stay of the said opinion and order.

The Commission orders:

The applications for rehearing of Opinion No. 337 and accompanying order filed herein by Southwestern Electric Power Company, and by Alabama Power Company, *et al.*, are hereby denied. Likewise, the requests for stay of the order accompanying the aforesaid opinion are denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride
Secretary.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 462

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion, findings and order of the Federal Power Commission (Pet. App. 50a–86a) issued August 17, 1960, and its order denying rehearing (Pet. App. 87a–90a) issued October 11, 1960, are reported at 24 F.P.C. 278 and 860, respectively. Its order of August 1, 1958, initiating the proceeding (Pet. App. 39a–49a, 75a–86a) is reported at 20 F.P.C. 108, and its order, issued July 15, 1959, on an interlocutory appeal from an exclusion of evidence by the examiner (R. 824–837) is reported at 22 F.P.C. 72. The opinion of the court of appeals (Pet. App. 6a–35a) is reported at 304 F. 2d 29.

JURISDICTION

The judgments of the court of appeals (Pet. App. 37a–38a) were entered on May 16, 1962. Petitions for rehearing filed on June 5, 1962, were denied on June 29, 1962 (Pet. App. 36a). The petition for a writ of certiorari was filed on September 26, 1962. The jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act (16 U.S.C. 825*l*).

QUESTIONS PRESENTED

1. Whether the Commission acted in excess of its power in ordering, after notice and hearing, that advertising expenditures which it found were political in character be reclassified from operating expense accounts to a miscellaneous income deduction account.

2. Whether petitioners were denied their right to a fair hearing by the Commission's treatment of evidence offered to show that expenditures for advertising directed against government-supported power agencies were just and reasonable and non-political.

3. Whether the Commission's order requiring petitioners to reclassify political advertising expenditures to an income deduction account abridges their freedom of speech or constitutes a deprivation of property without due process of law.

STATUTE AND REGULATIONS INVOLVED

The pertinent portion of Section 301 of the Federal Power Act (49 Stat. 854, 16 U.S.C. 825) and excerpts from the Federal Power Commission's Uniform System of Accounts Prescribed for Public Util-

ities and Licensees are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Petitioners seek to set aside a Federal Power Commission order directing them to reclassify on their books of account certain expenditures for advertising which the Commission found were undertaken for political purposes. The reclassification transfers the expenditures from the companies' operating expense accounts, where they had first been entered, to a specified income deduction account.

On August 1, 1958, the Federal Power Commission issued an order (Pet. App. 39a–49a, 75a–86a) questioning the accounts to which 76 companies had assigned moneys expended for nine advertisements, part of the so-called "Electric Companies Advertising Program" (ECAP). The nine advertisements, reproduced in the Commission order initiating the case (Pet. App. 75a–83a), appeared from 1956 to 1958 in magazines of national circulation. The companies, which are "licensees" or "public utilities" under the Federal Power Act, had charged the questioned amounts to operating expense accounts, Account No. 7872 Demonstration, Advertising and Other Sales Expenses, or Account No. 801, Miscellaneous General Expenses.[1]

The order questioned the propriety of this accounting under Section 301(a) of the Federal Power Act

[1] These accounts are prescribed in the Federal Power Commission Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act (effective Jan. 1, 1937; revised to Sept. 1, 1957). See Appendix, *infra*, pp. 20–22.

(16 U.S.C. 825(a)) (Appendix, *infra*, p. 19), on the grounds that the expenditures "relate to the matter of private versus public ownership of electric facilities, a subject of political controversy, and the [advertisements are] of an argumentative character or nature in that controversy," and that expenditures involving the "presentation of argument in matters of political controversy" are not properly includible in those accounts but rather should be classified in Account No. 538, Miscellaneous Income Deductions (Pet. App. 39a–40a, 43a–44a). The order set a hearing at which each of the companies was directed to present "any justification there may be for its * * * respective accounting entry or entries herein questioned; and shall show cause, if any there be, why it should not by an appropriate memorandum accounting entry reclassify to Account 538, the respective dollar amount[s]" * * * (Pet. App. 48a).

At the hearing the companies offered evidence to show that, regardless of any political "connotations" of the advertisements, the expenditures were reasonable operating expenditures to meet competition. They also offered statements of opinion that the expenditures were not of a political nature.[2] The presiding examiner excluded the proffered testimony (R. 827, 290), but allowed it to be included in the record as an offer of proof (Pet. 4–5). The companies appealed the ruling to the Commission (R. 824).

[2] The opinions were those of two accountants (R. 185, 208–209), an economist (R. 264–265) and ten utility officials (R. 300–301, 359, 389–390, 399, 412–413, 445, 559–560, 608, 617, 636, 647–650).

The Commission sustained the exclusion of evidence going to the reasonableness of the expenditures on the ground that it was irrelevant because the only question raised was whether or not the expenditures were for political purposes (R. 828, 834; 22 F.P.C. at 75, 78). As to the opinion testimony claimed to be relevant to that issue, the exclusion was sustained because of its lack of sufficient weight (R. 831; 22 F.P.C. at 77).

After completion of the hearing and receipt of briefs, the Commission, holding that the advertisements in issue were political in nature, ordered the companies to reclassify (or transfer) their respective expenditures in connection with the ECAP program for eight of the nine advertisements, Nos. 2 through 9 (Pet. App. 76a–83a), from the operating expense accounts in which they had originally charged them to Account 538 (Pet. App. 70a–71a). In so ruling, the Commission cited Accounting Interpretation E–110 of the National Association of Railroad and Utilities Commissioners, issued November 27, 1945,[3] which em-

[3] National Association of Railroad and Utilities Commissioners, Interpretations of the Uniform System of Accounts of Electric, Gas and Water Utilities, Bulletin No. 7. Interpretation E–110 reads (R. 829):

Question: What is the proper account to be charged with non-promotional advertising of the type sometimes referred to as institutional advertising or as goodwill advertising, the purpose of which is to foster and maintain public goodwill rather than for any immediate and direct promotion of sales of electricity or appliances?

Answer: Such advertising should be charged to Account 787.2, Advertising; however, Account 538, Miscellaneous Income Deductions, should be charged with the cost of

bodies the principles enunciated in *Northwestern Electric Co.*, 2 F.P.C. 369. It summarized that interpretation as providing (Pet. App. 56a–57a):

> * * * in effect, that the cost of advertisements that are reasonably to be characterized as political in character should be classified to Account 538, Miscellaneous Income Deductions, in contrast to expenditures for other types of advertisements which are charged to operating expense accounts. Among the instances of political advertisements given in this interpretation are advertisements for the purpose of influencing public opinion as to the election of public officers, proposed legislation, repeal of existing laws, and influencing decisions of public officers. * * *

Considering the questioned ads as the best evidence, the Commission found that they were political in character within the terms of Interpretation E–110 (Pet. App. 57a). It reviewed specific aspects of the eight ads and concluded (Pet. App. 57a):

> * * * they deal with a political controversy, the private-public power dispute, and hence involve the presentation of argument in matters of political controversy. Considered more particularly, a scrutiny of the advertisements and a reading of their texts discloses that they have as a basic ultimate purpose the influencing of

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any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, approval or revocation of franchises; for the purpose of influencing decision of public officers; or having any direct or indirect relationship to political matters.

> public opinion as to the repeal of existing law. Thus they have not just an indirect relationship to political matters, but are directly political. In addition, it is a fair inference that their ultimate purposes include the influencing of public opinion as to such matters as the election of public officers, proposed legislation, and influencing the decisions of public officers. And their purposes may also include the influencing of public opinion as to proposed ordinances, repeal of existing ordinances, and the approval or revocation of franchises.

The Commission rejected the companies' contention that it lacked authority to order an accounting reclassification based on the political character of the expenditures or to enforce such an accounting requirement, and found (Pet. App. 60a):

> Furthermore, the classification of these expenditures below the line as income deductions is necessary and appropriate for purposes of administering the Act and is reasonable thereunder. * * *

The Commission also specifically overruled the companies' objections to the examiner's exclusion of evidence proffered to establish the non-political character of the advertisements (Pet. App. 62a–63a). It found their "essentially political character * * * conclusively established by the advertisements themselves." "Assuming *arguendo*," it stated, "that respondents' proffered evidence shows that the expenditures have some other additional or subsidiary aspect or purpose * * * —this would not detract from their fundamentally political character, nor would it jus-

tify classifying them under our System of Accounts other than in the manner we find to be appropriate for political expenditures." The Commission then considered "with care" the opinion testimony that the advertisements were non-political (which had been included in full in the record as a proffer of proof) and concluded (Pet. App. 63a):

> * * * in view of the self-evident facts attested by the advertisements themselves, this evidence too, even when to it is added all the other evidence proffered by the respondents, is of insufficient weight to establish that the advertisements are in fact non-political in character.

Timely applications for rehearing were denied (Pet. App. 87a–90a).

On petitions for review, the Court of Appeals for the Fifth Circuit affirmed the order of the Commission, upholding it on each issue (Pet. App. 6a–35a). It pointed out, first, that Section 301 of the Federal Power Act, in authorizing the Commission to prescribe a system of accounts "as necessary or appropriate for purposes of administration of this Act," confers upon the Commission "a broad power to make administrative determinations of policy" (Pet. App. 15a). The court then concluded that the prescription of a separate accounting classification for political expenditures would aid in the administration of the Act. The court of appeals also held that the Commission, in determining the proper classification, was entitled to refer to Interpretation E–110; that the Commission's decision to put "political" expenses in

a separate category had a rational basis; that the exclusion of the proffered evidence was proper for the reasons cited by the Commission; and that there was no merit to the suggestion that the establishment of this accounting classification was a restriction upon free speech and a deprivation of property rights without due process of law.[4] Petitions for rehearing *en banc* were subsequently denied (Pet. App. 36a).

ARGUMENT

The question whether certain advertising expenses incurred by petitioners should be recorded in Account No. 538 of the Commission's Uniform System of Accounts, rather than Account Nos. 787.2 or 801, is plainly one committed to the discretion of the Commission, and the affirmance by the court below of the Commission's exercise of that discretion presents no problem warranting review by this Court. Nor do any of the subsidiary issues posed by the petition justify the grant of certiorari. Moreover, upon each of these issues, the holdings of the Commission and the court of appeals were correct and involve no conflict of decisions.

1. Section 301(a) of the Federal Power Act requires regulated companies to "keep * * * such accounts * * * as the Commission may by rules and regulations prescribe as necessary or appropriate for

[4] The court pointed out that the Commission had expressly stated that "these accounting classifications proceedings do not disturb any of the [petitioners'] property or other rights, which are subject to determination not here but in rate proceedings * * *" (Pet. App. 22a).

purposes of the administration of this Act * * *." It authorizes the Commission to "prescribe a system of accounts" to be kept by such companies and provides that "The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited." The Commission, having previously established a System of Accounts applicable to petitioners, initiated this proceeding under Section 301(a) to "determine by order the accounts in which particular outlays * * * shall be entered * * *," just as it had previously initiated scores of similar proceedings (see, for example, *infra*, pp. 11-12).

Petitioners argue that the Commission's admittedly broad authority under Section 301(a), control accounting by the public utilities subject to its regulations "as necessary or appropriate for purposes of the administration of this Act," is confined to prescribing or revising a "system of accounts," and that its accounting reclassification power under the same section is limited to application of the express provisions of the system it has previously prescribed. But nothing in the statute or the previous decisions of the Commission or the courts requires that the Commission prescribe such a detailed system of accounts in which each account expressly and particularly lists every expenditure to be classified therein. Rather, the Commission may reasonably choose to proceed, as it

did here, to prescribe a general definition of the accounts and then, by hearing and order, to reclassify expenditures which it determines come within the definition of a specific account.[5]

The holding below is plainly in accord with the leading decision on the Commission's accounting powers, *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119. There the Court had under consideration Commission accounting reclassification orders (reported at 2 FPC 327 and 3 FPC 83) requiring Northwestern Electric not merely to reclassify, but thereafter entirely to *eliminate* from its capital accounts $3,500,000, "by applying net income above preferred stock dividend requirements to its elimination" (321 U.S. at 121). Nothing expressly stated in the Commission's System of Accounts required that method of disposition. Thus, the case involved the very issue the present petitioners seek to raise, and the Court unanimously sustained the Commission's

[5] Petitioners suggest (Pet. 20–21) that the "necessary or appropriate" powers conferred in Section 301(a) apply only to rulemaking proceedings and not to adjudicatory proceedings; and that, while proceedings to prescribe or revise a system of accounts are rulemaking in nature, proceedings to reclassify expenditures are adjudicatory. But the reclassification proceeding is rulemaking. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119; compare Section 2(c) of the Administrative Procedure Act, 5 U.S.C. 1001(c). And even if the Commission's order in this case should be viewed as an adjudication, there were, as the court below held, sufficiently definite standards established in the Commission's System of Accounts to warrant the reclassification ordered here (see *infra*, p. 12).

order as within the power conferred by Section 301 (a).*

The court below also properly rejected (Pet. App. 14a) petitioners' reading of the Commission's System of Accounts as providing for entering in Account 538 only operating expenditures in excess of just and reasonable amounts. While, as the court noted, the System's General Instruction 2F (upon which the petition relies, Pet. 15–16) does provide that all such excesses shall be placed in that account, the System does not provide that only such amounts shall be placed there. The account itself, broadly captioned "538. Miscellaneous Income Deductions," lists other "items" as properly enterable, and General Instruction 5 makes the listed "items" representative, not exhaustive (Appendix, *infra*, pp. 18–20). Further, the regulations contemplate the probability that new questions of proper classification of expenditures will arise from time, for General Instruction No. 4 provides for the submission of such questions to the Commission for consideration and decision (see Appendix, *infra*, p. 18).

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* 321 U.S. at 122–123. The Court also rejected contentions, similar to those advanced here, that the order deprived the utilities of their constitutional right to due process. The breadth of the Commission's power with respect to reclassification of particular accounting entries is well established. *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. 2d 602 (C.A. 9), affirming 3 FPC 329; *California-Oregon Power Co.* v. *Federal Power Commission*, 150 F. 2d 25 (C.A. 9), affirming 3 FPC 368, 676, 947, certiorari denied, 326 U.S. 781; *Arkansas Power & Light Co.* v. *Federal Power Commission*, 185 F. 2d 751 (C.A. D.C.), affirming 8 FPC 106, certiorari denied, 341 U.S. 909.

2. The examiner's evidentiary rulings, affirmed by the Commission and the court below, were correct. Petitioners' contention (Pet. 11–14) that they were denied a fair hearing by the examiner's exclusion of allegedly relevant and material evidence rests upon their narrow interpretation of the Commission's accounting powers and their restrictive reading of the scope of the income deduction account prescribed by the Commission as part of the Uniform System of Accounts, and should be rejected for the same reasons.[7] The examiner correctly excluded the testimony that the expenditures were reasonable and necessary—and not excessive—to meet the competition of government-supported power agencies. The income deduction account is not limited to expenditures in excess of just and reasonable amounts, and therefore, even if the proffered evidence established that the expenditures were just and reasonable, they would still be a proper charge to the income deduction account.

The opinion testimony designed to show that the expenditures were non-political was included in the record as a proffer of proof and carefully considered by the Commission (R. 828–834; Pet. App. 63a, 87a–90a). The Commission found it to be without sufficient weight to avoid the conclusion, based upon a review of the advertisements themselves, that the expenditures were for a political purpose.

[7] The same flaw underlies petitioners' arguments that the court below improperly refused to substitute its judgment for that of the Commission with respect to the accounting required by the System of Accounts (Pet. 14–17), and that the record was insufficient to support the findings and order of the Commission (Pet. 18–19). Both depend upon their narrow reading of Section 301(a) and the System of Accounts.

3. Petitioners' constitutional contentions (Pet. 22-29) are similarly without merit. The accounting order works no deprivation of due process or freedom of speech, and petitioners' attempt to impute to it such a substantive effect ignores this Court's refusal to treat accounting requirements as fixing rates.

Petitioners say that when an operating expense is disallowed for accounting it will stay disallowed for rate-making purposes as well (Pet. 28). However, rate making will follow the prescribed accounting only if, after that accounting has separated an item of expenditure from routine operating expenditures, the utility in a rate proceeding fails to justify allowance of that expenditure as an operating expense for rate-making purposes. If such disallowance in fixing rates is improper, as petitioners would argue, it is the rate order which will work the injury, not the accounting reclassification. Similar attempts to defeat Commission accounting requirements by imputing substantive effect to them have consistently been overruled. *Northwestern Electric Co.* v. *Federal Power Commission*, 321 U.S. 119; *Pacific Power & Light Co.* v. *Federal Power Commission*, 141 F. 2d 602 (C.A. 9); *California-Oregon Power Co.* v. *Federal Power Commission*, 150 F. 2d 25 (C.A. 9), certiorari denied, 326 U.S. 781.

The same vice underlies petitioners' contention, based upon *Speiser* v. *Randall*, 357 U.S. 513, that the accounting order imposes an unconstitutional discrimination which abridges their freedom of speech. In *Speiser*, the Court held that "a discriminatory

denial of a tax exemption for engaging in speech is a limitation on free speech" (*id.* at 518). Petitioners attempt to find a similar discrimination in that competing "government-supported power agencies" are allegedly not subject to corresponding accounting requirements for anti-private power ads. However, the *Speiser* decision rested upon the direct economic effect of the discriminatory denial. Since the accounting order in this case has no present economic consequences, it is apparent, without considering other distinctions, that no comparable issue is presented here.[8]

[8] It is difficult, in any event, to see how petitioners could complain if government-supported power agencies are not subjected to an accounting requirement which petitioners say would lower rates and thereby strengthen the competitive position of such agencies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

LEONARD D. EESLEY,
Special Assistant to the General Counsel,

DREXEL D. JOURNEY,
Attorney,
Federal Power Commission.

NOVEMBER 1962.

APPENDIX

Section 301(a) of the Federal Power Act, 49 Stat. 854, 16 U.S.C. 825(a), provides:

> SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

Excerpts from the Federal Power Commission, Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, Effective January 1, 1937 (Revised to September 1, 1957):

INSTRUCTIONS—GENERAL

* * * * *

2. *Records.*

* * * * *

F. All charges to the accounts prescribed in this system for electric plant, income, operating revenues, and operating expenses shall be just and reasonable, and any payments by the utility in excess of just and reasonable charges shall be included in Account 538, Miscellaneous Income Deductions.

* * * * *

4. *Submission of Questions.*

To maintain uniformity of accounting, utilities shall submit questions of doubtful interpretation to the Commission for consideration and decision.

5. *Items List, Interpretation of.*

Lists of "items" appearing in the texts of the accounts or elsewhere herein are for the purpose of more clearly indicating the application of the prescribed accounting. The lists are intended to be representative, but not exhaustive. The appearance of an item in a list warrants the inclusion of the item in the account mentioned only when the text of the account also indicates inclusion, inasmuch as the same item frequently appears in more than one list. The proper entry in each instance must be determined by the texts of the accounts.

* * * * *

INCOME ACCOUNTS

* * * * *

538. *Miscellaneous Income Deductions.*

This account shall include miscellaneous debits to income, not provided for elsewhere.

ITEMS

1. Decline in value of investments. (See Balance sheet instruction 4.)
2. Donations.
3. Expenditures for associated companies for which the utility will not be reimbursed.

* * * * *

OPERATING EXPENSE ACCOUNTS

* * * * *

787.2. *Advertising.*

This account shall include the cost of labor and materials used and expenses incurred in connection with advertising for the purpose of promoting the sales of electricity.

NOTE.—Do not include in this account advertising in connection with merchandise or appliance sales.

ITEMS

1. Advertising in newspapers, periodicals, etc.
2. Advertising manager and assistants.
3. Clerks.
4. Materials and expenses in preparing:
   - (*a*) Advertisements.
   - (*b*) Booklets.
   - (*c*) Bulletins.
   - (*d*) Dodgers.
   - (*e*) Posters.
5. Stenographers and typists.

801. *Miscellaneous General Expenses.*

This account shall include such items of expense applicable to the electric department as the cost of publishing and distributing annual reports to stockholders; advertising notice of

stockholders' meetings; dividend and other corporate and financial notices of a general character; association dues; contributions for conventions and meetings of the industry; cost of research and experimental work conducted for the benefit of the electric department or the industry or for the improvement of electric service (except such amounts as may be properly chargeable to other accounts); fees of transfer agents, registrars of stock, and fiscal agents; director's fees; and any other miscellaneous expenses connected with the general management and not otherwise provided for.

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Supreme Court of the United States

OCTOBER TERM, 1962.

No. 462.

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Respondent,

and

ARIZONA PUBLIC SERVICE COMPANY, *et al.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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(See names of counsel at end of Reply Brief.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 462.

ALABAMA POWER COMPANY, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

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Certain statements made and positions taken in the Commission's Brief in Opposition must be challenged:

1. That brief says that the holdings below "involve no conflict of decisions" (p. 9), but it mentions only *Speiser* v. *Randall*, 357 U. S. 513 (1958) and completely ignores (a) the decisions of this Court in *Morgan* v. *United States*, 304 U. S. 1 (1938), *NLRB* v. *Babcock & Wilcox*, 351 U. S. 105 (1956), *Universal Camera Corp.* v. *NLRB*, 340 U. S.

474 (1951), *Service* v. *Dulles*, 354 U. S. 363 (1957), *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959) and *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (No. 1), 294 U. S. 63 (1935), and (b) the decision of the Court of Appeals for the District of Columbia in *American President Lines* v. *Federal Maritime Board*, F. 2d (D. C. Cir. 1962), which are directly in conflict with the holdings below (Pet., pp. 9, 10, 11, 15, 16, 17, 18, 21, 23). Our reference to *American President Lines* should be amplified by saying that in that case the Court of Appeals for the District of Columbia held that the Maritime Board *could not* amend one of its existing rules (General Order 69) by an adjudicatory order, while in this proceeding the Court of Appeals for the Fifth Circuit *permitted* the Power Commission to amend its rules and regulations (System of Accounts) by an adjudicatory order. The two decisions are squarely in conflict.

2. The Commission's brief argues that the Commission has power "to prescribe a general definition of the accounts and then, by hearing and order, to reclassify expenditures which it determines come within the definition of a specific account" (p. 11). We have urged throughout this case that the Commission proceed on that premise. Instead, the Commission flagrantly disregarded its own prescribed definitions, which provide the legal standards applicable in this proceeding (Pet., pp. 15-16).

Nothing is more fundamental in the System of Accounts than the distinction it makes between operating expenses and income deductions. But the Commission's order that the questioned expenditures be charged as income deductions rather than operating expenses was not based upon the legal standards provided in the System of Accounts. The Commission apparently did not consider, and certainly

did not find, that the questioned expenditures were not incurred in the company's electric operations (Account 502, Operating Expenses), were not expenses of furnishing electric utility service (Operating Expense Accounts Instruction No. 1), were not advertising expenses (Operating Expense Account 787.2), were not miscellaneous general expenses (Operating Expense Account 801), were not *just and reasonable charges* (General Instruction 2F), or were within the express provisions of Account 538. The Commission, ignoring these standards, based its order solely on its conclusion that the expenditures dealt with "the private-public power dispute and *hence* involve the presentation of argument in matters of political controversy" (App., p. 57a; emphasis ours), a standard neither to be found in nor consistent with the System of Accounts. There certainly *can be* expenditures which relate to the private-public power dispute which meet the tests of the System of Accounts for operating expenses. The expenditures questioned in *this* proceeding related to the private-public power dispute and fully met those tests. They preserved and enhanced the companies' business and benefited their customers, as the evidence we proffered, but which the Commission rejected, demonstrated beyond the possibility of challenge.

We do not urge, as the Commission's brief suggests (p. 10), that the System of Accounts must be so detailed as to list for each account "every expenditure to be classified therein"; we do submit that when the Commission orders the reclassification of expenditures it must proceed within the limits of its stated powers. It disregarded these limits and came squarely in conflict with decisions of this Court (Pet., pp. 14-17).

In *Northwestern Electric Co.* v. *FPC*, 321 U. S. 119 (1944), upon which the Commission's brief places great reliance, the account involved, Account 107, explicitly pro-

vided that "the amounts included in this account . . . shall be disposed of as the Commission may approve or direct". In *Northwestern*, the Commission had ordered the disposition of a "writeup" pursuant to this provision and offered expert evidence to support its disposition. This Court pointed out that it was not for it to determine what was the better accounting practice "*so long as the Commission has not plainly adopted an obviously arbitrary plan*" (321 U. S. at p. 124; emphasis ours). In that case the Commission's action was a determination "within the definition of a specific account", not in disregard of all such definitions, as in this proceeding.[1] None of the accounts involved in this case gives the Commission power to dispose of an expenditure as the Commission may approve or direct. In this case the Commission offered no expert evidence to support the accounting it ordered, but adopted a plan so at odds with its System of Accounts and with the record as to be arbitrary, capricious and whimsical.

3. The Commission's brief (p. 10) questions our reading of Section 301(a) and of the System of Accounts. We have dealt with this problem (Pet., pp. 19, 20), but we may add that our argument is made best by the very language of 301(a) and of the applicable provisions of the System. The distortion of that language by the court below was plainly erroneous.

4. The Commission's brief says (p. 13) that the evidentiary rulings made by the trial examiner (excluding, as irrelevant and immaterial, the evidence offered by what the court below (App., pp. 11a-12a) called "an impressive list of business executives, accountants and auditors, deans and professors of schools of business administration, public

[1] Other decisions cited at page 12 of the Commission's brief are equally inapposite.

utility financial advisors and security analysts, and presidents of electric power companies") and affirmed by the Commission and the court below, were correct.

But the justification of the accounting entries, their "propriety" under the System of Accounts, and the relationship of the questioned expenditures to the cost of furnishing electric utility service patently *were in issue* in this proceeding (Pet., pp. 12-14). The companies' proffered evidence was admittedly competent and was relevant and material to such issues even under strict rules of evidence. Could it be rationally declared that this evidence did not *shed any light upon or touch the issues*?[2] The Commission's total exclusion of the companies' evidence cannot be justified constitutionally (Pet., pp. 11-14).

The Commission's brief does not even discuss the proffered evidence as it related to the issues on which it was offered. That evidence *justified* the questioned expenditures by showing that they were *operating expenses* under the provisions of the System of Accounts (pp. 2-3, *supra*). Nor is any attempt made to condone the Commission's exclusion, in this accounting proceeding, of the testimony of outstanding accounting experts that the questioned expenditures were properly charged as operating expenses under the provisions of the Commission's System of Accounts and under general accounting principles. There has been *no* reference to the rules of evidence in any document filed by or on behalf of the Commission.

5. The Commission's brief (pp. 14-15) seeks to justify the Commission's abridgment of free speech and deprivation of property without due process of law solely on the ground that the Commission's order allegedly has no "substantive effect". Is it contended that the protection of

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[2] 20 Am. Jur., Evidence, §247. See Wigmore, *Evidence*, Third Ed. §29.

First Amendment rights depends upon dollar damage!, *Cf. N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958). And there is no reference in the Commission's brief to the conclusion of the Court of Appeals that the Commission's order has a serious impact on the companies (App., pp. 23a-24a) or to the Commission's report to the House of Representatives in which the Commission clearly imparted substantive effect to its accounting requirements (Pet., p. 28, n. 9).

6. Accounting Interpretation E-110 (Opp. Br., pp. 5-6, 8) was never promulgated as a rule or regulation of the Commission, never published in the Federal Register (R. 233-239), never formally approved by the Commission. The Commission, thus, not only deprived the companies of a fair hearing in this proceeding (Pet., pp. 11-14), but also applied against them a rule they never had a chance to contest in a rule-making hearing.

E-110 was repudiated in 1958 by the National Association of Railroad and Utility Commissioners (NARUC) which had issued it (R. 435) and has been repudiated by the Commission itself. The Commission's revised System of Accounts now in effect contains Account 930, Miscellaneous General Expenses, which provides for "Institutional or good will advertising" as an operating expense. The following note (in effect, Accounting Interpretation E-110) proposed, in 1958, for inclusion in the NARUC system which became the Commission's present System of Accounts is significantly absent from that System:

> "Note.—The cost of any advertising for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or

> ordinances, approval or revocation of franchises, or for the purpose of influencing the public or its elected officials, in respect to political matters shall not be included herein but charged to account 426, Other Income Deductions." (R. 435)

If the Commission had attached genuine consequence to E-110, it would have included that discarded note in the present System of Accounts.

7. The Commission's brief (pp. 6-7) repeats that agency's groundless inferences that the questioned advertisements involve the influencing of public opinion as to "repeal of existing law", "election of public officers", "proposed legislation", "influencing the decisions of public officers", "proposed ordinances", "repeal of existing ordinances", and "the approval or revocation of franchises". These inferences are directly contrary to the companies' proffered evidence and are thoroughly specious. There is no reference in the questioned advertisements to any such "repeal", "election", "legislation", "decisions", "ordinances" or "franchises". The theme of the advertisements is that there is a substantially greater tax burden on the customers of investor-owned electric utilities than there is on the customers of government electric utilities. Their obvious implication is that the rates of investor-owned utilities are higher than those of government utilities as a result of this tax differential (see Pet., p. 6).

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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